APPENDIX CONTENTS

Appendix
Page No.

A. Opinion from the United States Court of Appeals for the Sixth Circuit, entered 2/20/96 1

B. Decision and Entry Sustaining* in Part and Overruling in Part Defendants' Motion to Strike, entered 5/14/92 16

C. Order Indicating Court's* Intention to Ultimately Enter Judgment in Favor of the Plaintiff and Against the Defendant Sipes, entered 4/21/93 56

D. Order Following Up on Court's* Entry of April 21, 1993, entered 5/12/93 62

E. Judgment in Favor of Plaintiff* and Defendant, entered 5/12/93 66

* United States District Court, Southern District, Western Division

F. Decision and Entry Overruling* Plaintiff's Combined Motion for Judgment Notwithstanding the Verdict, entered 3/17/94 68

G. Judgment Overruling NOV Motion,* entered 3/17/94 77

H. Order Denying Petition for Rehearing *En Banc* from the United States Court of Appeals for the Sixth Circuit, entered 4/4/96 79

I. Motion to Overrule Defendants, City of Dayton, and James C. Newby's Motion for Separate Trials, entered 3/12/93 81

J. Supplementary Memorandum to Dismiss Defendants' Motion to Bifurcate, entered 3/15/93 100

K. Motion for Court to Overrule the Decision to Bifurcate Defendants in the Case at Bar, entered 3/17/93 113

L. Brief of the Appellant for the United States Court of Appeals for the Sixth Circuit, entered 8/30/94 117

M. Reply Brief for the Appellant/ Cross Appellee for the United States Court of Appeals for the Sixth Circuit, entered 11/22/94 . 201

N. Appellant/Cross Appellee's Petition for Rehearing with Suggestion for Rehearing *En Banc*, entered 3/5/96 241

O. Verified Complaint and Demand for Jury Trial, entered 6/13/89 267

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OPINION

NOT FOR PUBLICATION
No. 94-3436/3516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TONYA M. TINCH, Administratrix of the Estate of Scott E. Tinch; Individually as the surviving spouse of Scott E.Tinch; As Parent, guardian, and next friend of Amanda M. and Justin S.Tinch, Minors	)	
Plaintiff-Appellant, Cross Appellee,	)	ON APPEAL FROM THE UNITED STATES
vs.	)	DISTRICT COURT FOR THE SOUTHERN
CITY OF DAYTON; Michael J. Sipes; Russell E. Neville James E. Newby,	)	DISTRICT OF OHIO
	)	OPINION
Defendant-Appellees, Cross Appellant.	)	

BEFORE: KRUPANSKY, NORRIS, SUHRHEINRICH, Circuit Judges.

PER CURIAM

This is an appeal from the Southern District of Ohio, Western Division. Plaintiff-appellant Tonya M. Tinch (Plaintiff) has challenged, *inter alia*, the district court's instruction as to the measure of damages available in a § 1983 action, that court's decision to bifurcate and subsequent dismissal of the municipal defendants. and the district court's jury instructions and evidentiary rulings. Defendant-appellees Michael J. Sipes. Russell E. Neville, James E. Newby, and the City of Dayton challenged on cross-appeal the award of damages under § 1983 for decedent's loss of enjoyment of life and evidentiary rulings by the lower court.

Plaintiff's husband, Scott Tinch, was fatally shot by Detective Michael Sipes of the City of Dayton Police Department. Immediately prior to the shooting, Detectives Sipes and Neville (the defendant officers) were searching the decedent's brother at gunpoint. The record disclosed that the decedent entered upon the scene carrying an axe handle. Seeing his brother held at gunpoint, the decedent attacked the defendant officers. The officers had no opportunity to identify themselves during the short scuffle when Sipes shot and killed the decedent. Plaintiff charged that the shooting was unjustified and filed the instant action in federal district court, alleging violations of the decedent's constitutional rights. as well as state causes of action under the Ohio survival of actions and wrongful death statutes.

Ohio Rev. Code § 2305.21 and § 2125.01, against the defendant officers, the City of Dayton, the city-commissioners, the police chief, and the mayor.[1]

Prior to trial, the lower court bifurcated Plaintiffs suit into claims against the defendant officers[2] and claims against the City of Dayton and the police chief in his official capacity (the municipal defendants). The jury returned a verdict against Sipes under 42 U.S.C. § 1983 and awarded decedent's estate $111,000. After the City of Dayton announced its intention to satisfy the judgment against Sipes, the lower court dismissed Plaintiffs claims against the municipal defendants. The parties filed timely cross-appeals.

Of the $111,000, $25,000 was allocated to the decedent's conscious pain and suffering prior to death and $86,000 to loss of enjoyment of life by the decedent. Plaintiff charged on appeal that the district court erred when it instructed the jury that Plaintiff could recover damages only for the decedent's actual damages and damages for decedent's loss of enjoyment of life. By cross-appeal,

---

[1] Plaintiffs actions against the city commissioners and the mayor were subsequently dismissed.

[2] Plaintiffs complaint named the defendant officers as defendants in their official capacities only.

Defendants charged that the lower court erred when it failed to limit the measure of damages to compensation for the actual damage suffered by the decedent.

Section 1983 creates a federal cause of action for a deprivation of civil rights.[3] An action under § 1983 is a personal action accruing to the benefit of the person whose constitutional rights were violated and does not survive his death. *E.g. Jaco v. Bloechle,* 739 F.2d 239, 242 (6th Cir. 1984). As such, § 1983 is a "species" of tort committed against the individual whose constitutional rights have been denied *Cary v. Piphus.* 435 U.S. 247, 253, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978). In enacting § 1983 Congress, expressed an intent to compensate the victims of a civil rights violation committed under color of state law *Eg., Robertson v. Wegman,* 436 U.S. 584, 590-91, 98 S.Ct. 1991, 1985. 56 L.Ed.2d 554 (1978). It is well

---

[3] 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding.

settled that federal standards govern determination of damages under the civil rights statutes. 42 U.S.C. § 1988; *see also Sullivan v. Little Hunting Park, Inc.* 396 U.S 229, 238-40, 90 S.Ct. 400, 405-06, 24 L.Ed.2d 386 (1969); *Gordon v. Norman,* 788 F.2d 1194, 1199 (6th Cir. 1986). It is equally well settled that § 1983 does not provide adequate guidance to determine the measure of damages available in an action for a violation of a claimant's civil rights. *E.g. Bell v. Milwaukee,* 746 F.2d 1205, 1232 (7th Cir. 1984). Accordingly, 42 U.S.C. § 1988 directs that this Court turn to the common law of the forum state, in this case Ohio, to fill in the interstices in the federal framework.[4]

---

[4] 42 U.S.C. § 1988 provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "Civil Rights," and of the Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such

The decisions of this Circuit in *Jones v. Whittenberg University,* 534 F.2d 1203 (6th Cir. 1976), and *Jaco v. Bloechle* provide a clear and complete analysis of the actions available under Ohio law where the decedent's death is caused by a violation of his civil rights. An action under § 1983 is, by the explicit language of the statute, a personal action which accrues to the benefit of the injured party. Ohio's survival of actions statute, Ohio Rev. Code § 2305.21, provides that a cause of action for personal injury survives the death of the injured party, and may be brought by the decedent's personal representative on behalf of the decedent's estate to recover such damages the deceased might have recovered had he lived. *Eg. Perry v. Eagle-Picher Indus., Inc.,* 52 Ohio St.3d 168, 169-70, 556 N.E.2d 484, 486 (Ohio 1990); *Allen v. Buradette,* 139 Ohio St. 208, 211, 39 N.E.2d 153, 154 (1942); *Jones,* 534 F.2d at 1207. Plaintiffs § 1983 action on behalf of decedent is properly classified as a tort claim for personal injury which is preserved by Ohio's survival of actions statute. *Jaco,* 739 F.2d at 242-43.

---

civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Accordingly, the jury award of compensatory damages for Scott Tinch's pain and suffering which accrued prior to death was proper. Ohio Rev. Code § 2305.21. The jury verdict assigned $25,000 as compensatory damages for conscious pain and suffering resulting from decedent's virtually instantaneous death. A decedent's personal representative, in a survival action, may cover damages for the decedent's pain and suffering upon a showing that the decedent was conscious of his pain and suffering prior to death. *See Flory v. New York Central Rd. Co.,* 170 Ohio St. 185, 189, 163 N.E.2d 902, 905 (1959); *see also Jones,* 534 F.2d at 1213.

Ohio law does not, however, support recovery for decedent's loss of enjoyment of life. Axiomatically, no loss of enjoyment of life could have accrued in Scott Tinch's lifetime because Scott Tinch died virtually instantaneously and thus was not cognizant of that loss. *See, e.g., Flory,* 163 N.E.2d at 905; *Jones,* 534 F.2d at 1213; *cf. Ramos v. Kuzas,* 65 Ohio St.3d 42, 43-44, 600 N.E.2d 241, 242-43 (1992) (newborn cannot suffer "hedonic" damages because she cannot be cognizant of the loss of enjoyment of life). *rehearing denied,* 65 Ohio St.3d 1459, 602 N.E.2d 254 (1992). This Court concludes that the award of damages for decedent's loss of enjoyment of life was improper.

Pursuant to 42 U.S.C. § 1988, the Court must determine if a state law allowing for an award of damages for pain and suffering, and not for a decedent's loss of enjoyment of life in a survival action pursuant to § 1983, is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988. In resolving questions of inconsistency between state and federal laws pursuant to § 1988, a court must examine not only the particular federal statutes and constitutional provisions at issue, but also the policies underlying them. *Robertson,* 436 U.S. at 590.

As noted above, Congress expressed an intent that § 1983 serve to compensate the victims of civil rights violations committed under color of state law. Absent a showing of bad faith on the part of the governmental actor,[5] the Supreme Court has ruled that the deterrence policy of § 1983 operates through the mechanism of compensation of the actual damages suffered by the victim. *See Carey v. Piphus,* 435 U.S. at 256-57 (1978); *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 307, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986) ("deterrence is also an important purpose of this system, but it operates through the mechanism of damages

---

[5] The jury concluded that the defendant officers' bad faith conduct was not a proximate cause of the lethal deprivation of Scott Tinch's constitutional rights.

that are *compensatory*") (emphasis in original). As the Supreme Court noted in *Carey,* "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U.S. at 256-57. In the case at bar, Plaintiff has received compensation for the actual harm suffered by the decedent. This result is not inconsistent with the Constitution and laws of the United States.

Plaintiff had initially joined both the defendant officers and the municipal defendants in her complaint. The district court bifurcated Plaintiffs action into claims against the Sipes and Neville, and claims against the City of Dayton and its Chief of Police. After the jury returned a verdict against defendant Sipes and fixed the amount of damages to be awarded, the lower court dismissed Plaintiffs suit against the municipality and the Chief of Police when the City of Dayton agreed to satisfy the entire amount of damages awarded. On appeal, Plaintiff challenged both the lower court's initial decision to bifurcate the claims against the separate defendants and the subsequent dismissal of the municipal defendants.

Federal Rule of Civil Procedure 42(b) authorizes a court to bifurcate a trial, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[6] The decision to bifurcate is reviewed for abuse of discretion. *E.g. Yung v. Raymark Industries, Ind.*, 789 F.2d 397, 400 (6th Cir. 1986). In determining whether bifurcation is appropriate, a district court must balance several factors, including potential prejudice to the parties, potential confusion to the jury, and the relative convenience and economy which would result from separate trials. *See, e.g. In re Beverly Hills Fire Litigation,* 695 F.2d 207, 216 (6th Cir. 1982), *cert. denied,* 461 U.S. 929. 103 S.Ct. 2090, 77 L.Ed.2d 300 (1983); *Beeck v. Aquaslide,* 562 F.2d 537, 542 (8th Cir. 1977).

---

[6] Fed. R. Civ. P.42(b) reads in full:

> The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Contrary to Plaintiffs assertions of error on appeal, the district court did not abuse its discretion when it bifurcated the trial as to the separate defendants. A single violation of a person's constitutional rights may give rise to two separate and distinct § 1983 actions: one against the offending official and one against the city or state in whose name the official acted. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-036, 56 L.Ed.2d 611 (1978). While Plaintiff may have had separate claims for the violation of Scott Tinch's constitutional rights against the municipal defendants and the defendant officers, a finding that Scott Tinch suffered an actual violation of his constitutional rights at the hands of the defendant officers acting under color of state law was a necessary prerequisite to a finding of liability against the municipal defendants. *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986). A city or state's policies, standing alone, do not give rise to a § 1983 action. *Id.*

The subsequent dismissal of the municipal defendants after the City of Dayton announced its intention to satisfy the judgment against Defendant Sipes was also proper. The trial record disclosed that the jury evaluated the totality of the injury suffered by Scott Tinch. While Plaintiff may, assert separate and distinct § 1983 actions against the municipal defendants and the defendant officers,

she may recover only once for the injury suffered by Scott Tinch. Given the assumption of liability for those damages by the City of Dayton. Plaintiff can achieve nothing beyond a fruitless waste of judicial resources by proceeding against the municipal defendants.

Plaintiff asserted that she was entitled to seek declaratory or injunctive relief against the City of Dayton. Plaintiff, however, had failed to include a request for such relief in her complaint as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P.8(a). Plaintiffs boilerplate reference in her complaint to "such other and future relief to which [Plaintiff] may be deemed entitled" does not constitute notice of a claim, especially where Plaintiff failed to request such relief until after the jury returned its verdict.

Plaintiff also failed to assert a § 1983 action on her own behalf, or on behalf of the Tinch children, for possible violations of their constitutional rights arising from the death of Scott Tinch. The record disclosed that Plaintiff joined several § 1983 causes of action, but only on behalf of the decedent. A complaint must set forth "a short and plain statement of claims[s]," and "a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P.8(a). Plaintiffs failure to plead the above-mentioned claims constitutes waiver. *Cf. Purnell v. City of Akron,* 925 F.2d 941 n.6 (6th Cir. 1991).

Plaintiff also argued on appeal that the district court improperly instructed the jury. Specifically, Plaintiff asserted that (1) it was improper to instruct the jury on proximate cause in a § 1983 action; and (2) the instruction addressing punitive damages was confusing.[7]

Jury instructions are reviewed in their entirety "to determine whether they adequately inform the jury of relevant considerations, and provide a basis in law for aiding the jury to reach its decision." *Gafford v. General Elec. Co.,* 997 F.2d 150, 166 (6th Cir. 1993) (quoting *Beard v. Norweigian Carribean Lines,* 900 F.2d 71, 72 (6th Cir. 1990)).

Plaintiffs allegation that the district court's "proximate cause" instruction was also erroneous is misconceived since Plaintiff failed to enter a timely objection to the charge. Fed. R. Civ. P.51; *see also Clarksville-Montgomery City School System v. US. Gypsum,* 925 F.2d 993, 1006 (6th Cir. 1991).

---

[7] Because damages resulting from a decedent's *post mortem* loss of enjoyment of life, are not recoverable in a § 1983 action, the plaintiff exception to the district court's instructions addressing the measure of damages available in a § 1983 action are moot.

The district court's instruction addressing punitive damages was equally correct. This instruction[8] clearly is in accord with the definition of reckless or callous indifference referenced in *Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (concluding that it was error to require evil intent or malice toward plaintiff before imposing punitive damages on defendant under civil rights laws). Plaintiffs allegation that the jury was confused by the disjunctive "maliciously *or* wantonly *or* oppressively" (emphasis added) into believing that malice was a requirement for an award of punitive damages is not well taken. Since the jury concluded that Plaintiff had failed to prove any of the three elements in the instruction, any error regarding the inclusion of the element of malice was harmless.

---

[8] The jury instruction reads in pertinent part:

> [If] the act of Michael Sipes by seizing Scott Tinch through the use of excessive force, thus causing his death, was maliciously, or wantonly, or oppressively done, then you may ... [award] punitive and exemplary damages.
>
> ****
>
> An act or failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the [rights] of one or more persons, including the injured person.

This Court has examined the remaining charges of error on appeal and, upon due consideration, concludes they are without merit. Accordingly, the award of $25,000 for decedent's conscious pain and suffering accruing prior to death is **AFFIRMED**, and the award of $86,000 for decedent's *post mortem* loss of enjoyment of life is **REVERSED**.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
DECISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	Case C-3-89-263
vs.	)	Judge Walter Herbert Rice
CITY OF DAYTON, et al., Defendants.	)	

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION TO STRIKE (DOC. 171); DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC.. 146); DECISION AND ENTRY.OVERRULING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY (DOC. 153); CONFERENCE CALL SET TO DETERMINE TRIAL DATE

This case arises out of the death of Scott Tinch ("Tinch" or "the deceased") on June 17, 1987. On that day, Defendant Russell E. Neville ("Neville"), a Detective with the City of Dayton ("Dayton") Police Department, received a call from a sometime informant, Vickie Grubbs ("Grubbs"

Grubbs requested that Neville meet her. Thereafter, Neville and Defendant Michael J. Sipes ("Sipes"), also a Detective with the Dayton Police Department, traveled to 2147½ East Third Street, in Dayton, to meet with Grubbs. At that time, Neville and Sipes were dressed in street clothes, blue jeans and t-shirts, and assigned to duty as undercover officers. No one who did not know them would have recognized them as police officers.

When they arrived at 2147½ East Third Street, Neville and Sipes entered the house and went into the kitchen. Upon entering the kitchen, they were informed that Grubbs was in the bedroom. They decided to wait for her in the kitchen. Shortly thereafter, Shaun Tinch, the deceased's brother, entered the house through the kitchen and proceeded to the back bedroom where Grubbs was located. As Shaun Tinch walked through the kitchen, Neville and Sipes noticed a bulge under his shirt which was later identified as a flashlight. Nonetheless, the two officers allowed Shaun Tinch to enter the bedroom. The police officers were in a position where they could hear what was happening. Immediately after Shaun Tinch entered the house, the deceased (Tinch) followed him through the kitchen. When he entered the kitchen, Tinch was carrying an axe handle. After a brief conversation with Neville, Tinch also went to the back bedroom. After arguing with Grubbs, Tinch exited the bedroom and the house. Shaun

Tinch and Grubbs then entered the-kitchen from the bedroom. Grubbs identified Neville and Sipes as police officers and asked that they identify themselves to Shaun Tinch. Neville and Sipes not only identified themselves as police officers by producing their badges, they also took out their weapons and directed Shaun Tinch to put his hands against the wall. Shaun Tinch did so, and Sipes removed a flashlight from his pants.

At that point, Tinch re-entered the residence and kitchen.[1] What exactly happened next is the subject of a dispute. The Defendants contend that Neville and Sipes identified themselves as police officers, that Tinch was armed with the axe, handle and that he attacked Sipes with it. Plaintiffs contend that Neville and Sipes did not identify themselves as police officers, that Tinch was not armed with the axe handle and that he merely grabbed Sipes' wrists and the two wrestled. Regardless of how it happened, what is not controverted is that Sipes fired his gun once, killing Tinch.

[1] There is a dispute as to whether Tinch was carrying the axe handle when he reentered the kitchen.

On June 19, 1989, Plaintiffs[2] initiated this action, naming as Defendants, the City of Dayton; Neville; Sipes; the Mayor of Dayton, Richard C. Dixon ("Dixon"); its Chief of Police, James E. Newby ("Newby"); and three Dayton city Commissioners, Anthony Capizzi ("Capizzi"), Abner Orick ("Orick") and Mark Henry ("Henry"). Plaintiffs Sought compensatory and punitive damages, setting forth claims under 42 U.S.C. § 1983, alleging that the Defendants violated Tinch's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, as well as pendent state claims for wrongful death and survival.

This case is now before the Court on motions for partial summary judgment by the Defendants (Doc. #46) and the Plaintiffs (Doc. #53).[3] Defendants have also filed a motion to strike (Doc. #71) certain of the evidence Plaintiffs present in support of their motion for partial

---

[2] Tonya Tinch files this action in four separate capacities: as Administratrix of the estate of Scott Tinch, individually as surviving spouse of Scott Tinch, as parent and guardian on behalf of her minor child Amanda Tinch and as parent and guardian on behalf of her minor child Justin Tinch. Because of these distinct capacities, the Court will refer to Tonya Tinch as Plaintiffs.

[3] In their motion for partial summary judgment (Doc. #46), Defendants do not seek dismissal of any specific Plaintiff.

summary judgment and in opposition to Defendants, similar motion. The Court will first rule on the motion to strike and then turn to the motions for partial summary judgment, discussing them in the above order. Finally, the Court will summarize the claims and parties which remain after the motions for partial summary judgment are ruled upon.

I. Defendants' motion to strike (Doc. #71).

In response to the evidence which accompanies Plaintiffs' motion for partial summary judgment (Doc. #53), Defendants have moved to strike certain portions of same. See Doc. #71.[4] The Plaintiffs have not filed a memorandum in opposition to Defendants' motion.

First, Defendants contend that the affidavits of Millicent Swinford ("Swinford"), Nikki Dardio ("Dardio") and J.V. Coover ("Coover") must be stricken. *Id.* at 4-5. Defendants argue that these affidavits must be stricken because they lack a statement that they were made on personal knowledge. See Rule 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge,

[4] Defendants' motion to strike (Doc. #71) is also their memorandum in opposition to Plaintiffs' motion for partial summary judgment and their reply memorandum in support of their motion for partial summary judgment.

shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Additionally, with respect to the affidavits of Swinford and Dardio, Defendants contend that they are deficient because they are not sworn to under oath or signed under penalty of perjury. Defendants do not raise this later argument with respect to Coover's affidavit because it was made under oath. The Court rejects the Defendants' contention that these affidavits must be stricken because they do not contain the statement that they were made on personal knowledge. Rule 56(e) contains no such requirement, and a review of the three affidavits clearly indicates that the affiants are stating what they personally know. With respect to the Defendants' contention that Swinford's and Dardio's affidavits are defective because they were not sworn to under oath or signed under penalty of perjury, the Court agrees. A document which is not sworn under oath or signed under penalty of perjury is not an affidavit for purposes of Rule 56. Carter v. Western Reserve Psychiatric Habilitation, 767 F.2d 270, 73 n.2 (6th Cir. 1985); Inmates, Washington County Jail v. England, 516 F.Supp. 132 (W.D.Tenn. 1980), affirmed, 659 F.2d 1081 (6th cir. 1981) (table). These two affidavits are transcripts of interviews of Dardio and Swinford conducted on behalf of Plaintiffs. Both are signed by the affiant and a notary, and Swinford's indicates

that it is true to the best of her knowledge.[5] However, neither indicates that it was sworn to under oath or signed under penalty of perjury. Therefore, the court sustains Defendants' motion to strike (Doc. #71) to the extent that it seeks to have the Court strike the affidavits of Dardio and Swinford. The Court will not consider those affidavits in ruling on the pending motions. The Court overrules the motion to the extent that the Defendants seek to strike Coover's affidavit because it is properly attested to.

Second, Defendants seek to have the court strike the affidavit of William P. Riley ("Riley"). Defendants contend that the affidavit of Riley also violates Rule 56(e) because it contains conclusory statements as to the cause of the shooting nd because it is not based upon personal knowledge. The court does not agree. In his affidavit, Riley sets forth facts as a act witness and opinions as an expert witness. To the extent at it contains evidence of historic facts, Riley's affidavit is based upon personal knowledge.[6] Based upon the information contained in

---

[5] The signed version of Swinford's affidavit is Doc. #65.

[6] In his affidavit, Riley sets forth his personal knowledge of certain events which occurred when he was a member of the Dayton Police Department. If Defendants' real complaint is that Riley purports to set forth facts regarding events which occurred after he left the Police Department, the Court does not agree. In his affidavit,

Riley's affidavit, the opinion testimony contained therein is admissible. See Rule 702. Accordingly, the Court overrules the Defendants' motion to strike (Doc. #71) to the extent that it seeks to have the Court strike Riley's affidavit.

Third, Defendants seek to have the Court strike the "Recognized Standards, Literature, and Policy Considerations of Undercover Police Operations Reviewed by William P. Riley," ("Standards").[7] Defendants argue that the Standards, a collection of articles, papers and government standards, are hearsay and should be disregarded. The Court agrees. Without question the Standards are hearsay. The Standards are supplied for the purpose of proving that certain standards govern undercover operations. Also, they do not appear to be admissible, at present, as learned treatises, under the exception to the hearsay rule contained in Rule 803(18), as Plaintiffs have not laid the foundation required by Rule 803(18) by showing that any statement contained in any of the Standards is reliable authority. Therefore, the Court sustains Defendants' motion to strike (Doc. #71) to the

---

Riley does not testify, other than as an expert witness, that any particular events occurred or did not occur after he left the Police Department. Such is permissible testimony for an expert witness pursuant to Fed. R. Evid. 703.

[7] The Standards are part of Doc. #55.

extent that it seeks to have the Court strike the Standards (Doc. #55). said standards will not be considered by this court in ruling on the aforesaid motions for partial summary judgment.

Fourth, Defendants seek to have the Court strike an edited videotape (Doc. #63) submitted by the Plaintiffs. The Court will do so. The videotape is a compilation of the videotaped depositions of Neville, Sipes and Grubbs, and videotapes of the statements which they gave to Dayton police shortly after Scott Tinch was shot. The Court, however, will consider transcripts of the depositions of Neville, Sipes and Grubbs. Therefore, the Court sustains Defendants' motion to strike (Doc. #71) to the extent that it seeks to have the Court strike the edited videotape (Doc. #63) submitted by the Plaintiffs. Said edited videotape will not be considered by the Court in ruling on the Parties' motions for partial summary judgment.

Fifth, Defendants request that the Court strike the copy of the report of special prosecutor Jose M. Lopez (Doc. #64). Defendants argue that the report must be stricken because it is not properly authenticated, because the report addresses a different time frame from that which is implicated by this case and because the report addresses different issues than those which are involved in the present

case.[8] The Court agrees with Defendants with respect to their first argument. The report is simply not authenticated by an affidavit or as provided in Rule 902. Thus, the report is not Rule 56 material. Therefore, the Court sustains the Defendants' motion to strike (Doc. #71) to the extent that it seeks to have the Court strike the report of Jose Lopez (Doc. #64). Said report will not be considered further by the Court.

Sixth, Defendants request the Court to strike the article of an expert witness, Mr. Marx, which is part of the Standards. For the reasons set forth above in connection with Defendants' motion to strike the Standards, the Court sustains this last portion of Defendants' motion to strike (Doc. #71). Said article will not be considered by this court in ruling on the motions at issue.

II. Standards governing motions for summary judgment.

As an initial matter, the Court will set forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered

[8] Defendants do not argue that the report must be stricken because it is hearsay.

"against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. See also Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (The moving party has "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial." quoting Gutierrez v. Lynch, 826 F.2d 1534, 1536 [6th Cir. 1987]). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. Celotex Corp., 477 U.S. at 324. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

III. Defendants' motion for partial summary judgment (Doc. #46).

With their motion, Defendants seek summary judgment on behalf of Orick, Henry, Capizzi, Dixon and Newby as to all claims asserted under § 1983 on the basis that they had no personal involvement in the death of Tinch; on behalf of Dayton as to all claims under § 1983 on the basis that this case did not involve an official custom or

policy; on behalf of Neville because his actions did not cause or contribute to the death of Tinch; on behalf of all Defendants as to the claim for punitive damages, under § 2125.02, and Dayton as to the claim for punitive damages, under § 1983; and on behalf of all Defendants as to Plaintiffs' claims under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. The Court will discuss these questions in the above order.

A. Liability of Orick, Henry, Capizzi, Dixon and Newby.

Defendants argue that Orick, Henry, Capizzi, Dixon and Newby cannot be held personally liable because they did not do anything; they were not involved in the incident out of which is suit arose. Defendants argue that Plaintiffs attempt to hold Orick, Henry, Capizzi, Dixon and Newby liable under a respondeat superior basis, a basis which is simply insufficient to bottom liability under 42 U.S.C. § 1983. Plaintiffs contend, not surprisingly, that they seek to hold Orick, Henry, Capizzi, Dixon and Newby liable on more than a respondeat superior basis. In particular, Plaintiffs contend that in the aftermath of the shooting of James Urseth and a finding by a jury in this court at Dayton was liable for the wrongful death of Urseth, there was a complete failure on the part of Orick, Henry, Capizzi, Dixon and Newby to train undercover officers.

In order to hold a supervisory official liable for the constitutional tort of his or her subordinates, the plaintiff must show an affirmative link between the police misconduct and the adoption of any plan or policy by the supervisors showing that the supervisors authorized or approved the misconduct. Rizzo v. Goode, 423 U.S. 362, 371 (1976). Thus, respondeat superior is not a basis for holding a supervisor liable under § 1983. Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). Rather, supervisory officials can be held liable for their own unconstitutional behavior. Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989). "The law is clear that liability of supervisory personnel must be based on more than merely the right to control employees." Hays v. Jefferson County, Ky., 668 F.2d 869, 872 (6th Cir.) , cert. denied, 459 U.S. 833 (1982). In Leach, the Sixth Circuit explained:

> [A] failure of a supervisory official to supervise, control, or train the offending individual [employees] is not actionable absent a showing that the official either encouraged or in some way directly participated in it. At a minimum, a plaintiff must show that the official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending [employees].

Id., quoting, Hays, 668 F.2d at 874.

From the foregoing, it is clear that Orick, Henry, Capizzi and Dixon are entitled to summary judgment; however, Newby is not so entitled to summary judgment. With respect to Orick, Henry, Capizzi and Dixon, Plaintiffs do not allege that they encouraged or participated in the actions of Neville and Sipes, nor do they allege that they implicitly authorized, approved or knowingly acquiesced in those activities. On the contrary, Plaintiffs seek to impose liability upon Orick, Henry, Capizzi and Dixon solely on the basis of their alleged failure to properly train undercover officers, without showing that they at least implicitly authorized, approved or knowingly acquiesced in the actions of Neville and Sipes or that they even had the responsibility to train those officers. This is something which Rizzo and its progeny do not allow. Hays, 668 F.2d at 875. Therefore, the court sustains the branch of Defendants' motion for partial summary judgment in which they seek summary judgment on behalf of Orick, Henry, Capizzi and Dixon. This branch of Defendants' motion explicitly seeks summary judgment only on Plaintiffs, § 1983 claims. However, with the dismissal of Plaintiffs, § 1983 claims against Orick, Henry, Capizzi and Dixon, the Court no longer has pendent jurisdiction over Plaintiffs' wrongful death claim against those Defendants. Therefore, the Court dismisses, sua sponte and without prejudice, the pendent state claims against those Defendants for want of subject

matter jurisdiction.[9]

With respect to Newby, the evidence and allegations are different. Plaintiffs allege that Newby, as Dayton's chief of police, was responsible for the training of officers in the Dayton police department and that he was responsible for promulgating rules which govern the operations, including undercover operations, of that department. Plaintiffs also allege that the failure to train officers in undercover work and the absence of rules and regulations circumscribing such operations caused the use of excessive force which in turn killed Tinch. See Riley Aff. at ¶¶ 12-14. As is discussed in detail below in connection with the branch of Defendants' motion on behalf of Dayton, there is ample evidence before the Court to support the propositions that there was a failure to train undercover officers and that there was an absence of rules and regulations governing undercover operations. Moreover, the question of whether the lack of training or the absence of rules was the proximate cause of the use of excessive force is a genuine issue of material fact in this case. Therefore, the Court

[9] The Court cannot retain jurisdiction over Plaintiffs' pendent state claims against Orick, Henry, Capizzi and Dixon pursuant to supplemental jurisdiction, 28 U.S.C. § 1367, because supplemental jurisdiction applies only to actions commenced after December 1, 1990, a period in time long after this action was commenced.

overrules Defendants' motion for partial summary judgment (Doc. #46) to the extent that it seeks summary judgment on behalf of Newby.

B. Liability of Dayton.

Defendants seek summary judgment for Dayton on Plaintiffs' claims under § 1983. Defendants argue that Dayton is entitled to summary judgment pursuant to the rule announced in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). Defendants contend that there is no evidence that the actions of Neville and Sipes were taken pursuant to a policy or custom of Dayton. Additionally, Defendants argue that the Plaintiffs cannot impose liability upon Dayton based upon an asserted failure to train Neville and Sipes because they, in fact, received training on when deadly force can, be used. In support of this later contention, Defendants attach the affidavit of Sipes to their motion for partial summary judgment (Doc. #46). In his affidavit, Sipes states that before anyone can qualify as a Dayton police officer he or she must attend the Police Academy where they receive the training required by state law. Sipes Aff. at ¶ 5. Additionally, Sipes states that all Dayton police officers are required to attend in-service training on an annual basis, which training includes firearms requalification and classroom instruction in areas such as

policy and procedures, search and seizure techniques, use of force policy and the like. *Id* at 6-7. Also, Sipes states that the Dayton Police Department has a policy regarding the use of deadly force which limits its use to instances "when it becomes absolutely necessary to protect oneself or other persons from death or great bodily arm or to arrest one who has committed a serious felony or to prevent the escape of such a felony suspect." *Id.* at ¶ 3.

Plaintiffs present two theories under which they contend liability may be imposed on Dayton: 1) the deficient training it provides its officers; 2) failure to provide rules and regulations governing undercover operations. With respect to deficient training, Plaintiffs contend that in the aftermath of the shooting of James Urseth and a finding by a jury in this Court that Dayton was liable for the wrongful death of Urseth, there was a complete failure on the part of Dayton to train undercover officers. Moreover, the Plaintiffs argue that the shooting of Tinch was caused by this failure to train officers for undercover work. Thus, Plaintiffs' theory is not that there as the improper use of a firearm; rather, their theory is that the absence of training put Sipes in a position where he had no choice but to shoot Tinch. Plaintiffs support these

contentions with Riley's affidavit.[10] In his affidavit, Riley, Dayton's former assistant chief of police and a police officer for 24 years, states that undercover work is unique and dangerous and at it requires specialized training. Riley also states that Tinch was killed as a result of the failure to train officers in undercover operations. With respect to their second theory, Plaintiffs contend that the absence of rules and regulations which circumscribe the operations of undercover operations is a policy or custom which caused the death of Tinch through the use of excessive force. As with their argument regarding the lack of training, Plaintiffs support this argument with Riley's affidavit in which he states that there was a lack of Rules and Regulations (lack of policy) in the Dayton police department regarding undercover operations and that this lack of policy caused the death of Tinch.

In Monell, the Supreme Court held that municipalities are "persons" within the meaning of § 1983. *Id.* at 690. However, the Monell Court also said that a municipality cannot be held liable on the basis of respondeat superior; rather, "it is when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be

---

[10] Riley's affidavit is attached to Plaintiffs' motion for partial summary judgment (Doc. #53).

said to represent official policy, inflicts the injury that the government is responsible under § 1983." *Id.* at 694. In City of Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court addressed the question of whether a failure to train police personnel could serve as the basis for imposing liability on a municipality in a § 1983 action. In answering the question, the Supreme Court first stated that the basic inquiry under Monell is whether there is a causal link between the municipal policy or custom and the alleged constitutional deprivation. *Id.* at 385. Next, the Supreme Court said that it was not necessary for the policy or custom itself to be unconstitutional, nor was it enough if an employee applied a constitutional policy in an unconstitutional manner. *Id.* at 386-87. The Supreme Court said "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact." *Id.* at 388 (footnote omitted). The Supreme Court further explained its holding:

> Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied merely by alleging that the existing program for a class of employees, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is

whether the training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees [,] the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

In resolving the issue of a city's liability, the focus must be on the adequacy of the training program in relation to the tasks the particular officers perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty program. ... It may be, for example, that an otherwise sound program has occasionally been negligently

administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes the fact that they do says little about the training program or the legal basis for holding the city liable.

Moreover, for liability to attach in this circumstance, the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus [,] in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well

> trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

Id. at 389-91 (footnotes and citations omitted).

Applying Harris to the present case, the Court concludes that the question of whether Dayton can be held liable for inadequate training is a genuine issue of material fact. As is stated above, the Plaintiffs' theory with respect to a failure to train is broader than merely failing to train officers in the use of firearms. Plaintiffs contend that there was a complete failure to train officers in undercover operations, thus putting Sipes in the position where he had no choice but to shoot Tinch, and that this failure caused Tinch's death.

The evidence before the Court certainly supports Plaintiffs' contention. Without overburdening this opinion, construing the evidence in the manner most favorable to the Plaintiffs, as the Court must in ruling on Defendants' motion for partial summary judgment, indicates that the incident which led to Tinch's death was a hybrid operation--part undercover and part not-undercover. When Neville and Sipes went to 2147½ East Third Street, they were dressed so that no one would or could have recognized

them as police officers. They were in plain clothes and wore no badges or anything else which could identify them as police officers. When they got to the residence on East Third, they merely entered, not bothering to identify themselves as police officers.[11] They sat in the kitchen, not even bothering to tell Grubbs that they were there. When the Tinch brothers entered the house, they did not identify themselves as police officers. Moreover, they noticed the bulge under Shaun Tinch's shirt yet allowed him to enter the back bedroom and to confront Grubbs. It was not until Grubbs and Shaun Tinch entered the kitchen and Grubbs identified them as police officers that Neville and Sipes conceded that they were such. At that point, Neville and Sipes, still not discernable as police officers, took out their weapons and proceeded to search Shaun Tinch, thus acting in a non-undercover manner, yet failing to disclose to the world beyond Shaun Tinch and Grubbs that they (Neville and Sipes) were something other than criminals accosting a private citizen.[12] Thus, when Tinch

---

[11] Indeed, the purpose of their visit was to assist Grubbs' sister. When they arrived, Grubbs' sister was passed out on the porch. Neville and Sipes merely stepped over her and entered the residence, making no effort to help her or to inquire into whether they could help her.

[12] The evidence before the Court indicates that Neville and Sipes did not fear for their safety when they drew their guns and searched Shaun Tinch.

re-entered the kitchen, he had no way of knowing that the two individuals holding his brother at gunpoint were police officers, making a physical confrontation with the concomitant use of alleged excessive force almost inevitable. Tinch's reaction was quite normal under the circumstances.[13]

The evidence before the Court raises a genuine issue of material fact as to whether the incident unfolded in the foregoing manner because of the inadequate training of undercover officers. Additionally, the same evidence supports Plaintiffs' alternative theory that the absence of constraining rules and regulations governing undercover operations was a policy or custom which caused Tinch's death. Accordingly, the Court overrules the branch of Defendants' motion for partial summary judgment (Doc. #46) in which they seek summary judgment for Dayton.

C. Liability of Neville.

Defendants argue that Neville is entitled to summary judgment because he did not do anything to cause the death

[13] According to Robin Tinch, Detective William Fricker, a homicide investigator for the Dayton Police Department, said that he did not believe the shooting was justifiable.

of Tinch, since Sipes and not Neville fired the fatal shot. Since Neville did not actively participate in the alleged use of excessive force, Defendants argue that he is entitled to summary judgment. Plaintiffs do not contend that Neville used excessive force in seizing Tinch.[14] Plaintiffs argue that Neville may be held liable because he was involved in the incidents which led to the death of Tinch. For instance, Plaintiffs assert that, since Neville was the leader of the two officers when they went to the Third Street residence to visit Grubbs, Neville was responsible for the chain of events which led to the shooting of the deceased. Once again, construing the evidence in the manner most favorable to the Plaintiffs, as the Court must in ruling on Defendants' motion for partial summary judgment, the evidence indicates that Neville was as responsible as Sipes for creating the atmosphere which led to the death of Tinch.

The Court agrees with Plaintiffs that Defendants take too narrow a view of the basis upon which Neville may be held liable. For instance, in an excessive force case, the Sixth Circuit has said that "it is not necessary, in order to hold a police officer liable under § 1983, to demonstrate that the officer actively participated in striking the plaintiff."

---

[14] Sipes fired the only shot, the shot which killed Tinch. At the time that Sipes fired the shot, Neville lunged at Tinch, striking him. Plaintiffs do not argue that this constituted the use of excessive force to seize Tinch.

Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). The Second Circuit explained "[a] law enforcement officer has an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated in his presence by other officers." O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988). This Court concludes that this affirmative duty extends to the limited circumstances of this case, wherein an officer such as Neville is equally responsible for creating a situation where a physical confrontation with the concomitant risk of the use of excessive force becomes nearly inevitable. Moreover, both Bruner and O'Neill relied upon Byrd v. Brishke, 66 F.2d 6 (7th Cir. 1972), the case which established that police officers may be held liable for failing to stop a beating being imposed by another officer. In Byrd, the court reached that conclusion by reading § 1983 against the background of common law tort liability. *Id.* at 10. See also, Monroe v. Pape, 65 U.S. 167, 187 (1961). Applying the same analytical framework o the case at bar, the common law has long imposed liability on one who acts in concert with another, even though the injury is caused by the second. See e.g. Restatement, Second, Torts § 876. Therefore, the Court overrules the Defendants' notion for partial summary judgment (Doc. #46) to the extent that it seeks summary judgment on behalf of Neville.

D. Plaintiffs' entitlement to punitive damages.

Defendants seek summary judgment for all Defendants on Plaintiffs' claims for punitive damages under § 2125.02 for wrongful death and for Dayton on Plaintiffs' claims for punitive damages under § 1983. Plaintiffs do not challenge Defendants' contentions. Indeed, it is unquestionable that punitive damages are not available under Ohio's wrongful death statute and that punitive damages may not be awarded against a municipality under § 1983. Rubeck v. Huffman, 54 Ohio St.2d 20, 374 N.E.2d 411 (1978) (wrongful death); City of Newport v. Fact Concerts, 453 U.S. 247 (1986) (§ 1983). Therefore, the Court sustains the branch of Defendants' motion which seeks summary judgment on Plaintiffs' claims for punitive damages under Ohio's wrongful death statute and on Plaintiffs' claims against Dayton under § 1983.[15]

---

[15] In their memorandum in opposition to Defendant's motion, Plaintiffs argue that even though they may not recover punitive damages under § 2125.02, such an award is available under Ohio's survival statute, Ohio Rev. Code § 2305.21. The Court agrees with Plaintiffs that § 2305.21 does allow for the award of punitive damages in the appropriate case. Defendants did not move for summary judgment on the question of the possibility of an award of punitive damages under that section. Therefore, whether such an award is possible in

E. Plaintiffs' claims under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments.

Defendants seek summary judgment on Plaintiffs' claims under 1983 in which they allege that the Defendants violated Tinch's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments.

1. Fourth Amendment.

Defendants argue that Plaintiffs have no § 1983 claim based upon a violation of the Fourth Amendment because the uncontroverted evidence establishes that Tinch would not have standing to challenge a search of the residence at 2147½ East Third Street. Rakas v. Illinois, 439 U.S. 128 (1978). The Court agrees; however, the Court fails to see how this entitles Defendants to summary judgment. The Plaintiffs do not allege that Tinch's Fourth Amendment rights were violated because he was exposed to a search in violation of the Fourth Amendment; rather, they contend that the shooting of Tinch was an illegal seizure of him. Merely because one does not have standing under the Fourth Amendment to challenge police officers' entry into

---

this case must await the trial. However, in order to obtain an award of punitive damages for their survival action, Plaintiffs must prove, inter alia, that Tinch suffered conscious pain before he died.

a premises does not mean that he cannot contest the legality, under the Fourth Amendment, of the officers' seizure of him within that residence or premises. Without question, the use of excessive force in the context of a seizure under the Fourth Amendment can give rise to a § 1983 claim for violation of the Fourth Amendment. Graham v. Conner, 490 U.S. 386 (1989) ; Lewis v. city of Irvine, Ky., 899 F.2d 451 (6th Cir. 1990).[16] Therefore, the court overrules the branch of Defendants' motion for partial ummary judgment in which they seek summary judgment on Plaintiffs, § 1983 claims based upon an alleged violation of the Fourth Amendment.

2. Fifth Amendment.

The Plaintiffs allege and argue that the Defendants actions violated Tinch's right to due process guaranteed by the Fifth Amendment. Simply stated, the Due Process Clause of the Fifth Amendment does not apply to actions of municipalities and their officers and employees. Cf.

---

[16] In Graham, the Supreme Court said "all claims that law enforcement officers have used excessive force--deadly or not--in he course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach" pursuant to the Fourteenth Amendment. 490 U.S. at 395.

Osgood v. District of Columbia, 567 F.Supp. 1026, 1032, n.3 (D.D.C. 1983) (Because the District of Columbia is not a state, the Due Process Clause of the Fifth Amendment rather that the Due Process Clause of the Fourteenth Amendment is applicable). Rather, Plaintiffs must rely on the due Process Clause of the Fourteenth Amendment for protection. Therefore, the Court sustains the branch of Defendants motion for partial summary judgment in which they seek summary judgment on Plaintiffs' § 1983 claims for violation of the Fifth Amendment.

3. Sixth Amendment.

The Plaintiffs also allege that the Defendants' actions denied Tinch his rights under the Sixth Amendment. The Court does not agree. The Sixth Amendment provides certain procedural protection in criminal prosecutions such as the right to a speedy, public trial by jury, the right to confront one's accusers, the right to compulsory process for obtaining witnesses on one's behalf and the right to have assistance of counsel. Not all of these protections, particularly the right to assistance of counsel, are merely trial rights. For instance, the right to the assistance of counsel extends to all "critical" stages of a prosecution. Michigan V. Jackson, 475 U.S. 625, 629-30 (1986). Moreover, the right can attach when the investigation of a crime focuses on a particular person. Escobedo v. Illinois,

378 U.S. 478 (1964). However, none of the Defendants' actions remotely impinged upon Tinch's right to counsel or other Sixth Amendment rights. Therefore, the Court sustains the branch of Defendants' motion in which they seek summary judgment on Plaintiffs' § 1983 claims for violation of the Sixth Amendment. See also, Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103 (1985) (Mere arrest is not an adversary judicial proceeding and does not trigger Sixth Amendment right to counsel.).

4. Eighth Amendment.

Plaintiffs' allege that the Defendants' actions violated the Eighth Amendment's proscription against cruel and unusual punishment. This is simply not so. The Cruel and Unusual Punishment Clause of the Eighth Amendment only applies only after conviction and sentence. Graham, 490 U.S. at 398. Ingraham v. Wright, 430 U.S. 651, 671, n.40 (1977). Therefore, the Court sustains the branch of Defendants' notion which seeks summary judgment on Plaintiffs' § 1983 claims based upon a violation of Tinch's rights secured by the Eighth Amendment to be free from cruel and unusual punishment.

5. Fourteenth Amendment.

Defendants seek summary judgment on Plaintiffs' § 1983 claims based upon the alleged violation of Tinch's rights secured by the Due Process Clause of the Fourteenth Amendment. In particular, Defendants argue that they are entitled to summary judgment on Plaintiffs, claims that Tinch was denied procedural due process.[17] The Court

[17] Defendants' do not seek summary judgment on Plaintiffs, § 1983 claims under the Fourteenth Amendment for deprivation of substantive due process and equal protection. With respect to the former, if Tinch was seized, then Plaintiffs may have a claim under the Fourth Amendment but they would not have a substantive due process claim. Graham, supra. Additionally, under Graham, Plaintiffs' Fourteenth Amendment claim that Tinch was summarily punished can be pursued only through an excessive force claim under the Fourth Amendment. With respect to the equal protection claim, a violation of the Equal Protection Clause is bottomed upon discriminatory treatment based upon a person's membership in a discrete and insular class based upon some inherent personal characteristic such as race, sex or nationality. Equal protection "does not duplicate common law tort liability by conflating all persons not injured into a preferred class receiving better treatment than a plaintiff who alleges tortious injury." Joyce v. Mavromatis, 783 F.2d 56, 57 (6th Cir. 1986). Accord Booher v. U.S. Postal Service, 843 F.2d 943, 944 (6th Cir. 1988). Therefore, the Court will sua sponte dismiss Plaintiffs' claims under the Fourteenth Amendment for deprivation of substantive due process and equal

agrees that to the extent that Plaintiffs are asserting claims that Tinch was denied procedural due process, Defendants are entitled to summary judgment on those claims. In an instance such as the present, where the harm is a result of a random and unauthorized act,[18] a person claiming that he or she was denied life, liberty or property without procedural due process is relegated to state post-deprivation remedies when such remedies are provided. Braley v. City of Pontiac, 906 F.2d 220, 224-25 (6th Cir. 1990). Here, Ohio has provided a post-deprivation remedy in the form of a wrongful death action. Therefore, the Court sustains the branch of Defendants' motion in which they seek summary

---

protection.

[18] The terms "random and unauthorized are terms of art in procedural due process jurisprudence which describe what deprivations need not be accompanied by a predeprivation hearing. See e.g. Hudson v. Palmer, 468 U.S. 517 (1984); Parrat v. Taylor, 451 U.S. 527 (1981). The Court has concluded that there is a genuine issue of material fact as to whether the death of Tinch through the alleged use of excessive force was caused by the failure to train undercover officers and the lack of rules and regulations circumscribing undercover officers' behavior. Nonetheless, the acts of Neville and Sipes were random because, when Neville and Sipes went to 2147½ East Third Street on the night of June 17, 1987, no one could anticipate that their actions would lead to the death of Tinch. Their actions were unauthorized because, on that night, Dayton did not authorize them to shoot Tinch.

judgment on Plaintiffs' § 1983 claims for deprivation of procedural due process as guaranteed by the Fourteenth Amendment.

IV. Plaintiffs, motion for partial summary judgment (Doc. #53).

Plaintiffs seek summary judgment on liability alone. Doc. #53. That motion for partial summary judgment is overruled. In ruling on Plaintiffs' motion for partial summary judgment, the Court must construe the evidence most favorably to the Defendants. Despite Plaintiffs' request that it do so, the court cannot make credibility determinations, in ruling on this or any other motion for summary judgment. In other words, the Court cannot determine that the deposition testimony of Neville and Sipes is not credible. Simply stated, there are genuine issues of material fact as to whether any remaining Defendant, Neville, Sipes, Newby and Dayton, can be held liable for Tinch's death under either federal or state claims. The basic facts surrounding the shooting of Tinch are in dispute. Indeed, Plaintiffs spend a significant amount of space in their motion challenging the credibility of Neville and Sipes. See Doc. #53 at 14-20. However, even if the basic facts were not in dispute, the Court would be required to overrule Plaintiffs' motion. A reasonable jury could

conclude that Sipes did not act unreasonably when he shot Tinch. Construing the evidence most favorably to the Defendants, a permissible inference is that Tinch knew that Neville and Sipes were police officers, yet her attacked Sipes with a club; Sipes then shot Tinch in self defense.

Finally, without overburdening this opinion, this Court disagrees with Plaintiffs that Murphy v. City of Long Beach, 696 F.Supp. 500 (C.D.Cal. 1987), reversed on other grounds, 914 F.2d 183 (9th Cir. 1990), mandates the entry of summary judgment in favor of Plaintiffs on the issue of liability. Murphy, as with the present case, involved allegations of wrongful death through the use of excessive force. In Murphy, based upon the facts of that case, the district court, after the jury had returned a verdict in favor of the defendants, entered a judgment notwithstanding the verdict in favor of the plaintiffs on the plaintiffs' claim for wrongful death under California law.[19] The district court did not disturb the jury's verdict in favor of the defendants. on plaintiffs' constitutional claims. In Murphy, the

[19] The Court of Appeals reversed the grant of a judgment notwithstanding the verdict because the plaintiffs had failed to raise the argument upon which their motion for a judgment notwithstanding the verdict was based in a motion for a directed verdict. Murphy v City of Long Beach, 914 F.2d 183 (9th Cir. 1990). See also Rule 50(b).

defendants, police officers, gave the plaintiffs' decedent reason to believe that they were armed trespassers at his home.[20] When he saw the officers, Murphy picked up his rifle and was in turn shot by a policeman. Simply because a district court in California, ruling on a matter of California state law, decided that the evidence in the case before it warranted the entry of a judgment notwithstanding the verdict in favor of the plaintiffs therein, does not mean that Plaintiffs herein are entitled to summary judgment on the issue of liability.

Based upon the foregoing, the Court hereby overrules Plaintiffs' motion for partial summary judgment (Doc. #53).

V. What claims and Defendants remain.

Based upon all of the foregoing, the remaining Defendants are Neville, Newby, Sipes and the City of Dayton. The remaining claims against these four Defendants are as follows:

A. As to Neville and Sipes:

---

[20] Unlike the decedent in Murphy, Tinch was not at his home when he was shot; indeed, he could have been the trespasser.

1. The Plaintiffs have a claim under § 1983 for violation of Tinch's Fourth Amendment right to be free from unreasonable seizures (excessive force); and

2. Plaintiffs have pendent state claims for wrongful death and survival.[21]

B. As to Newby:

1. Plaintiffs have a claim under § 1983, predicated upon supervisory liability for failure to train and the maintenance of a custom or policy, directly and proximately resulting in the death of Tinch; and

2. Plaintiffs have pendent state claims for wrongful death and survival.

C. As to Dayton:

1. Plaintiffs have two theories under § 1983 by which they may impose liability for the damages caused by the constitutional torts of its employees, Neville and Sipes: 1) Dayton failed to adequately train its officers and that this failure caused Tinch's death through the use of excessive force; and 2) the absence of rules, regulations and standards of

---

[21] Of course, Plaintiffs will be able to prevail on a survival action only if they prove that Tinch suffered conscious pain before he died. Rubeck v. Huffman, supra, 374 N.E.2d at 413-14. At present, the evidence is not clear on the question of whether Tinch suffered such pain.

Dayton which circumscribe the operations of undercover officers is a custom or policy of Dayton which custom or policy caused the death of Tinch through the use of excessive force.

2. Plaintiffs' also have a pendent state claims against Dayton for wrongful death and survival.

D. With respect to their requests for punitive damages, Plaintiffs may assert a claim for punitive damages only against Sipes, Neville and Newby under § 1983 and against Neville, Sipes and Newby for the survival action on behalf of Tinch.[22]

Finally, Defendants did not request summary judgment on two of Plaintiffs, § 1983 claims, for violations of substantive due process and equal protection. For reasons previously discussed, footnote 17, the Court sua sponte dismisses those claims. First, a substantive due process claim for the use of excessive force or for summary punishment, in the context of a seizure, no longer exists. Graham, supra. Second, Plaintiffs do not allege that Tinch was treated differently because of his membership in a discrete and insular class based upon some inherent personal characteristic such as race, sex or nationality. Therefore,

---

[22] Ohio Rev. Code § 2744.05(A) prohibits the imposition of punitive damages against a political subdivision such as Dayton. See Ohio Rev. Code § 2744.01(F) ("'Political subdivision' ... means municipal corporation ....").

Plaintiffs' do not have a § 1983 claim for violation of equal protection.[23]

The Court hereby schedules a conference call for June 4, 1992 at 4:30 p.m., to determine a trial date and other dates leading to the resolution of this litigation.

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:
Dwight D. Brannon, Esq.
Neil F. Freund, Esq. Jane M. Lynch, Esq.

---

[23] In a recent letter to the Court, Plaintiffs' counsel supplemented its memorandum with the recently decided case of Osborne v. Lyles, 63 Ohio St.3d 326, 587 N.E.2d 825 (1992). In Osborne, the Ohio Supreme Court discussed the application of the doctrine of respondeat superior as it applied to a municipality. Since the motions before the Court do not raise the question of respondeat superior, the Court has had no occasion to discuss Osborne.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	
vs.	)	Case No. C-3-89-263
MICHAEL J. SIPES, RUSSELL NEVILLE, CITY OF DAYTON Defendants.	)	Judge Walter Herbert Rice

ENTRY INDICATING COURT'S INTENTION TO ULTIMATELY ENTER JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT SIPES, FOR STATED AMOUNT; DIRECTION TO DEFENDANTS' COUNSEL; OBSERVATIONS OF COURT SET FORTH; THIS ENTRY IS NOT A FINAL, APPEALABLE ORDER

Based upon applicable Interrogatories returned by a duly empaneled jury on Thursday, April 8, 1993, following submissions on the evidence and the law applicable to the Plaintiff's claims against the Defendants, Sipes and Neville, this Court will ultimately enter judgment in favor of said Plaintiff and against the Defendant, Michael J.

Sipes, in the amount of $111,000.00, plus post-judgment interest at the prevailing rate, and costs of suit, on the Plaintiff's claim against said Defendant brought under 42 U.S.C. S 1983, alleging excessive force in violation of the Fourth Amendment to the United States Constitution.

Further, based upon answers to what the jury deemed to be applicable interrogatories, this Court will ultimately enter judgment as follows on the remainder of the Plaintiff's Complaint against the Defendants, Michael Lt. Sipes and Russell Neville, James E. Newby (in his official capacity as Chief of Police) and the City of Dayton:

1. In favor of the Defendant, Russell Neville, and against the Plaintiff on all aspects of her claim against said Defendant under 42 U.S.C. §1983, alleging excessive force in violation of the Fourth Amendment to the United States Constitution;

2. In favor of the Defendants, Michael J. Sipes and Russell Neville (as well as James Newby and the City of Dayton), and against the Plaintiff, upon all aspects of her claims against said Defendants under the State of Ohio wrongful death statute, setting forth a claim for the alleged wrongful death of Scott Tinch and any conscious pain and suffering sustained by him, between the time of the shooting and the time of his death;

3. In favor of the Defendant, Michael J. Sipes, and against the Plaintiff, on any claim of the Plaintiff for punitive damages under 42 U.S.C. §1983, alleging the excessive use of force in violation of the Fourth Amendment to the United States Constitution.

This Court has labored mightily, but without apparent success, to convince Plaintiff's attorney that there exists no separate constitutional tort, against the City of Dayton and its Chief of Police, for their alleged failure to adequately train undercover police officers and/or for their failure to have policies and procedures in effect governing undercover police operations engaged in by these officers. Indeed, the issue of inadequate training, as well as the lack of policies and procedures, far from being a separate constitutional tort, operates only as a vehicle (or a conduit) for the imputation of any liability found against the individual police officers, for having committed a constitutional tort, to the ultimate supervisor of those officers and their employer, the City of Dayton. Even were such a separate constitutional tort to exist, Plaintiff would be unable to recover any additional sum of money, above and beyond what has already been adjudged due and owing from the Defendant Sipes, from the Chief of Police and the City of Dayton. The value of the Plaintiff is damages, in the form of recompense for Scott Tinch's pain and suffering and the value of the enjoyment of his life, has already been

fixed by the jury in the amount of $111,000.00. No action against the City or its chief of Police would serve to increase this res or corpus. The jury-assessed value of the Plaintiff's claim cannot be enhanced by a further judgment against the Chief of Police or the City of Dayton.

Accordingly, once Defendants' counsel advises this Court that his client has offered to pay the amount of the jury's verdict, as is required by Ohio law and the Collective Bargaining Agreement between the City and the Fraternal Order of Police, this Court will conclude that there is no purpose to be served by a second trial, during which the Plaintiff would attempt to impute the liability found against Sipes on her constitutional claim to the City of Dayton and its Chief of Police. only in the event that the city would refuse to do that which the law requires (in the sense of indemnifying Officer Sipes) would an action against the City, in any form, be a legally viable alternative. Accordingly, once the city has notified this Court that it is prepared to indemnify the Defendant Sipes, this Court will file a final judgment entry, in the form as suggested above, coupled with a certification under Fed. R. Civ. P. 54 (b), attesting to the fact that there is no just reason for delay. Such a judgment entry, coupled with the referenced certification, will allow an immediate appeal of all issues that have taken place, to date, in this litigation.

It is the request of this Court that Plaintiff's counsel file a "bare bones" request for attorney's fees, not later than 20 days following date of receipt of notice of this entry. No attachments to said request for attorney's fees need be filed at this time, for the reason that this Court has determined to await the resolution of the appeal (and, perhaps, cross appeal) in this matter, prior to dealing with the attorney's fees issue. The issue of hedonic damages, upon which this Court instructed in the damages portion of the Plaintiff's §1983 claim against Sipes, a claim upon which thejury found for the Plaintiff in the amount of $86,000.00, remains a more than viable issue for any appeal that might be taken. In dealing with the issue of attorney's fees, this Court will be mindful of the fact that the Plaintiff, albeit successful against one Defendant on her §1983 claim, was unsuccessful, with regard to the other Defendant, on all three claims, and unsuccessful against the Defendant Sipes on two of the three claims. Moreover, this court will be mindful that approximately 80% of the damages recovered is in the area of hedonic damages. Should this aspect of the judgment be reversed by the Sixth Circuit Court of Appeals, Plaintiff's request for attorney's fees will be reduced significantly.

April 20, 1993

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

copies to:
Dwight Brannon, Esq.
Neil Freund, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	
vs.	)	Case No. C-3-89-263
MICHAEL J. SIPES, RUSSELL NEVILLE, JAMES NEWBY CITY OF DAYTON Defendants.	)	Judge Walter Herbert Rice

ENTRY FOLLOWING UP ON COURT'S ENTRY OF APRIL 21, 1993 (DOC. 1139); JUDGMENT ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT SIPES, ON PLAINTIFF'S CLAIM AGAINST SAID DEFENDANT BROUGHT UNDER 42 U.S.C. § 1983; JUDGMENT ENTERED IN FAVOR OF DEFENDANT NEVILLE AND AGAINST PLAINTIFF ON PLAINTIFF'S CLAIM UNDER 42 U.S.C. §1983; JUDGMENT ENTERED IN FAVOR OF DEFENDANTS SIPES, NEVILLE, NEWBY AND THE CITY OF DAYTON, AND AGAINST THE PLAINTIFF, UPON ALL ASPECTS OF HER CLAIMS AGAINST SAID DEFENDANTS UNDER THE STATE OF OHIO WRONGFUL DEATH STATUTE; JUDGMENT

ENTERED IN FAVOR OF DEFENDANT SIPES AND AGAINST THE PLAINTIFF ON ANY CLAIM OF THE PLAINTIFF FOR PUNITIVE DAMAGES UNDER 42 U.S.C. §1983; ENTRY REFLECTING CORRESPONDENCE FROM DEFENDANTS' COUNSEL; DECLARATION, PURSUANT TO FED. R. CIV. P. 54(b), THAT THERE IS NO JUST REASON FOR DELAY; THIS ENTRY IS A FINAL, APPEALABLE ORDER; TERMINATION ENTRY

As a follow up to this Court's Entry of April 21, 1993 (Doc. #139, attached), this Court has received a communication from Defendants' counsel, dated April 27, 1993 (attached), attesting to the fact that the City of Dayton has offered to pay the amount of the jury's verdict to the Plaintiff on behalf of Officer Sipes. Having thus obtained the City's assurance of indemnifying the Defendant against whom the verdict was returned, this Court will enter judgment in favor of said Plaintiff and against the Defendant, Michael J. Sipes, in the amount of $111,000.00, plus post-judgment interest at the prevailing rate, and costs of suit, on the Plaintiff's claim against said Defendant, brought under 42 U.S.C. §1983, alleging excessive force in violation of the Fourth Amendment to the United States Constitution.

Further, based upon answers to what the jury deemed to be applicable interrogatories, this Court will enter judgment as follows on the remainder of the Plaintiff's Complaint against the Defendants, Michael J. Sipes, Russell Neville, James E. Newby (in his official capacity as Chief of Police) and the City of Dayton:

1. In favor of the Defendant, Russell Neville, and against the Plaintiff on all aspects of her claim against said Defendant under 42 U.S.C. §1983, alleging excessive force in violation of the Fourth Amendment to the United States Constitution;

2. In favor of the Defendants, Michael J. Sipes and Russell Neville (as well as James Newby and the City of Dayton), and against the Plaintiff, upon all aspects of her claims against said Defendants under the State of Ohio wrongful death statute, setting forth a claim for the alleged wrongful death of Scott Tinch and any conscious pain and suffering sustained by him, between the time of the shooting and the time of his death;

3. In favor of the Defendant, Michael J. Sipes, and against the Plaintiff, on any claim of the Plaintiff for punitive damages under 42 U.S.C. §1983, alleging the excessive use of force in violation of the Fourth Amendment to the United States Constitution.

Pursuant to the Entry of April 21, 1993, this Court will expressly declare, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay of an entry of final judgment, in the manner and form as set forth above, and the Court will expressly direct the office of the Clerk of Courts to enter said final judgment in the aforesaid manner.

This entry, when matched with the separate Judgment Entry which this Court is herein directing the Office of the Clerk of Courts to prepare and file, will be a final, appealable Order.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

May 11, 1993

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

Dwight D. Brannon, Esq.
Neil F. Freund, Esq.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al.,	)	
Plaintiffs,	)	
	)	
vs.	)	JUDGMENT IN A
	)	CIVIL CASE
CITY OF DAYTON, et al.,	)	
Defendants.	)	Case Number: C-3-89-263

XXX **Decision by Court**. This action came to trial or hearing before the Court. The issues have tried or heard and a decision has been rendered.

IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff and against Defendant Sipes, on Plaintiff's claim against said Defendant brought under 42 U.S.C. §1983; judgment is entered in favor of Defendant Neville and against Plaintiff on Plaintiff's claim under 42 U.S.C. §1983; judgment entered in favor of Defendants

Sipes, Neville, newby and the City of Dayton, and against the Plaintiff, upon all aspects of her claims against said Defendants under the State of Ohio wrongful death statute; judgment entered in favor of Defendant Sipes and against the Plaintiff on any claim of the Plaintiff for punitive damages under 42 U.S.C. §1983; and that the captioned case is hereby terminated.

May 17, 1993
Date

Kenneth J. Murphy
Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
DECISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	
vs.	)	Case No. C-3-89-263
CITY OF DAYTON, et al., Defendants.	)	Judge Walter Herbert Rice

DECISION AND ENTRY OVERRULING PLAINTIFF'S COMBINED MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR RECONSIDERATION, AND FOR NEW TRIAL TO ALTER OR AMEND JUDGMENT (DOC. #152) IN ITS ENTIRETY; DEFENDANTS' MOTION FOR STAY OF ALL PROCEEDINGS RELATED TO PLAINTIFF'S APPLICATION FOR ATTORNEYS FEES, COSTS, PREJUDGMENT INTEREST AND ENFORCEMENT OF PRESENT JUDGMENT, PENDING APPEAL (DOC. #164) DEEMED MOOT IN PART AND SUSTAINED IN PART; RULING ON PLAINTIFF'S MOTION FOR ATTORNEYS FEES, COSTS AND PREJUDGMENT INTEREST (DOC. #149) DEFERRED PENDING APPEAL

The Plaintiff's Combined Motion for Judgment notwithstanding the Verdict, for Reconsideration and for new Trial to Alter or Amend Judgment (Doc. #152) is, in this Court's opinion, deemed to be not well taken and same is, therefore, overruled in its entirety.

In ruling as aforesaid, the Court makes the following, non-exclusive, observations:

1. Over the course of some 99 pages, Plaintiff's counsel has either revisited issues both fully argued and decided adversely to him at the time of trial, or set forth positions and theories which were not presented to the trial court in the first instance. This Court has reviewed, as carefully as can be done, both memoranda submitted by the Plaintiff in support of the above referenced motion and has concluded that nothing is to be gained by repeating, within the body of this Opinion, rulings (and the rationale undergirding said rulings) which were fully set forth upon the record made of the trial proceedings.

2. By way of explanation, this Court has stated, in its April 21, 1993, Entry (Doc. #139), which inter alia, set forth certain observations, that:

> [t]his Court has labored mightily, but without apparent success, to convince Plaintiff's attorney

that there exists no separate constitutional tort, against the City of Dayton and its Chief of Police, for their alleged failure to adequately train undercover police officers and/or for their failure to have policies and procedures in effect governing undercover police operations engaged in by these officers. Indeed, this issue of inadequate training, as well as the lack of policies and procedures, far from being a separate constitutional tort, operates only as a vehicle (or a conduit) for the imputation of any liability found against the individual police officers, for having committed a constitutional tort, to the ultimate supervisor of those officers and their employer, the City of Dayton. Even were such a separate constitutional tort to exist, Plaintiff would be unable to recover any additional sum of money, above and beyond what has already been adjudged due and owing from the Defendant Sipes, from the Chief of Police and the City of Dayton. The value of the Plaintiff's damages, in the form of recompense for Scott Tinch's pain and suffering and the value of the enjoyment of his life, has already been fixed by the jury in the amount of $111,000.00. No action against the City or its Chief of Police would serve to increase this res or corpus. The jury-assessed value of the Plaintiff's claim cannot be enhanced by a further judgment against

the police officers or the City of Dayton.

Of course, there exists a separate constitutional tort, against the City of Dayton and its Chief of Police, for their alleged failure to adequately train undercover police officers and/or for their failure to have policies and procedures in effect governing undercover police operations engaged in by these officers, which said separate constitutional tort can be prosecuted against the City, without the joinder, as parties defendant, of the individual police officers whose constitutional tort is alleged to have been directly and proximately brought about by said alleged failure to adequately train undercover police officers, etc. However, no separate constitutional tort, of the dimension described above, exists against the City of Dayton, without the need to first establish a constitutional tort committed by someone who was allegedly inadequately trained, etc. Were it otherwise, the City could be found liable for the failure to adequately train, etc., when that failure has not been shown to have been the direct and proximate cause of any damages and/or injury to the party plaintiff.

3. Merely because it is permissible, and, therefore, not an abuse of discretion, to proceed to trial against both the individual police officers and the City, the theory of liability against the latter being a "Monell-type" violation, does not mean that it is an abuse of this Court's

discretion to bifurcate the action against the police officers from trial of this "Monell-type" claim. Indeed, this Court takes the position that such bifurcation is in the best interest of all parties, given the fact that the individual police officers should be allowed to defend against the plaintiff's claims, based upon their action or inaction, at the time in question, without their having to further defend both the City's policies and practices and the defalcations of other police officers for actions taken or not taken, having no relevance whatsoever to the operative facts of the given case.

4. In the preamble to the above motion, Plaintiff's counsel asks this Court "to affirm the judgment against Defendant Sipes on the Plaintiff's excessive force claim under 42 U.S.C. §1983". Nothing in this Court's ruling, set forth above, is intended to adversely affect upon the jury's verdict in favor of the Plaintiff on said claim, or the viability of this Court's May 12, 1993, Judgment Entry (Doc. #146), which entered judgment in favor of the Plaintiff and against the Defendant Sipes, on said claim.

The Defendant's Motion for Stay, pursuant to Fed. R.Civ. P. 62(b) and (d), seeking an Order of the Court staying all proceedings related to Plaintiff's application for attorneys fees, costs, prejudgment interest and enforcement of the present judgment pending the disposition of

Defendant's Motion for New Trial and Appeal (Doc. #164), is declared moot in part and sustained in part. Said motion, made pursuant to Fed. R. Civ. P. 62(b), is moot, given the fact that this Court has, within this entry, disposed of the Plaintiff's Motion for Judgment Notwithstanding the Verdict, for Reconsideration, and for New Trial to Alter or Amend Judgment. Said motion is sustained, to the extent that same is filed pursuant to Fed. R. Civ. P. 62(d), seeking such a stay pending appeal.

Further briefing by counsel and rulings by this Court on the Plaintiff's Motion for Attorneys Fees, Costs and Prejudgment Interest (Doc. #149) will be stayed/deferred pending the resolution of the anticipated appeal of this litigation to the United States Court of Appeals for the Sixth Circuit.

In ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. In the opinion of this Court, it would be a waste of both judicial resources and the time and effort of counsel to require briefing upon and resolution of the issue of attorneys fees costs and prejudgment interest, prior to the resolution by the Sixth Circuit Court of Appeals of the proceedings had to date in this litigation. An attorney's fees award, for example, which could be mooted (should

the previously conducted trial upon the merits be reversed) or at the very least, superseded (by the need to consider additional amounts sought by Plaintiff's counsel for fees, costs and prejudgment interest, in the case of an affirmance), militates against this Court resolving these issues at this time. While this Court believes in the rulings that it has made, there are issues which deserve to be tested in the appellate court. For example, this issue of hedonic damages, upon which this Court instructed in the damages portion of the Plaintiff's 1983 claim against Sipes, a claim upon which the jury found for the Plaintiff in the amount of $86,000.00, remains a more than viable issue for any appeal that might be taken. In addition, in dealing with the issue of attorneys fees, this Court must consider the ultimate (upon appeal) disposition of the Plaintiff's claim, not only against the Defendant Sipes on the Section 1983 cause of action, but also against the other Defendants against whom a successful verdict was not recovered.

2. South the Sixth Circuit Court of Appeals affirm this Court's judgment, in whole or in part, Plaintiff's counsel will be given 20 days following the receipt of the mandate to file a then "up-to-date" application for attorneys fees and costs. The Defendants will have 20 days following receipt of Plaintiff's submission to file a memorandum contra said motion for attorneys fees and costs and, in addition, to set forth their position on the Plaintiff's request

for prejudgment interest. Not later than 10 days following date of receipt of Defendants' submission, the Plaintiff's counsel will file whatever reply memorandum is deemed necessary.

3. In the memorandum accompanying the Motion for Attorneys Fees, Costs and Prejudgment Interest (Doc. #149), Plaintiff's counsel makes several comments to which this Court must make response. Plaintiff's counsel avers that "no depreciation by this Court's prior comment will change the true nature of the effort," *id* at 5, and that .... the Court may feel the effort was 'bare-bones'". It appears that counsel has misunderstood this Court's comments. While there exists a great chasm between the understanding of the Court and Plaintiff's counsel, over certain of the legal issues involved in this litigation, and while, at least at the trial court level, the judge's understanding controls, this Court does not now, nor has it ever, doubted either the sincerity of Plaintiff's counsel or his willingness or ability to zealously and vigorously advocate the rights of his clients. There is nothing in this Court's entry of April 21, 1993 (Doc. #139), an entry to which Plaintiff's counsel refers in his earlier quoted remarks, that even remotely depreciates the effort that Plaintiff's counsel has expended in this litigation. Moreover, this Court's only reference to "bare-bones" is set forth on page 4 of said entry, wherein the Court requests

"that Plaintiff's counsel file a "bare-bones" request for attorneys fees ... No attachments to said request for attorneys fees need be filed at this time, for the reason that this Court has determined to await the resolution of the appeal (and, perhaps, cross appeal) in this matter, prior to dealing with the attorneys fees issue."

4. Defendants' counsel has indicated, by letter of April 27, 1993, to this Court (copy to Plaintiff's counsel) (see attachment to Doc. #139) that "we may also wish to file an application for attorneys fees on those claims successfully defended." Such a filing, if still considered viable by Defendants' counsel, must be made within 20 days from date of any mandate issued by the Sixth Circuit Court of Appeals.

March 16, 1994

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

Dwight D. Brannon, Esq.
Neil F. Freund, Esq.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	
vs.	)	JUDGMENT IN A CIVIL CASE
CITY OF DAYTON, et al., Defendants.	)	Case Number: C-3-89-263

Jury Verdict. This action came before the Court for a trial by jury. The issues have been and the jury has rendered its verdict.

X **Decision by Court**. This action came to trial or hearing before the Court. The issues have tried or heard and a decision has been rendered.

IS ORDERED AND ADJUDGED that the Plaintiffs' combined Motion for Judgment Notwithstanding the Verdict, for reconsideration and for new trial to alter or amend judgment overruled in its entirety.

May 17, 1993
Date

Kenneth J. Murphy
Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER DENYING
PETITION FOR REHEARING
WITH SUGGESTIONS FOR REHEARING

No. 94-3436/3516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TONYA M. TINCH, Administratrix of the Estate of Scott E. Tinch; Individually as the surviving spouse of Scott E.Tinch; As Parent, guardian, and next friend of Amanda M. and Justin S.Tinch, Minors	)	
Plaintiff-Appellant, Cross Appellee,	)	
vs.	)	ORDER
CITY OF DAYTON; Michael J. Sipes; Russell E. Neville James E. Newby,	)	
Defendant-Appellees, Cross Appellant.	)	

BEFORE: KRUPANSKY, NORRIS, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
MOTION TO OVERRULE

IN THE UNITED STATES FEDERAL DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al.,	) CASE NO. C-3-89-263
	)
Plaintiffs,	) (Judge Walter H. Rice)
vs.	)
	) MOTION TO OVERRULE
CITY OF DAYTON, et al.,	) DEFENDANTS, CITY OF
	) DAYTON AND JAMES C.
Defendants.	) NEWBY'S MOTION FOR
	) SEPARATE TRIALS
	) MEMORANDUM IN
	) SUPPORT

MOTION

Now come the Plaintiffs, by and through their attorney, and do hereby respectfully move this Honorable Court to overrule the request to bifurcate the trial on the issue of official custom or policy from the remaining claims and issues. Plaintiffs specifically request that this case go forward against all the Defendants upon all claims. They are joint and concurrent tortfeasors and the claims against them cannot be separated.

Respectfully submitted,

DWIGHT D.BRANNON & ASSOCIATES

Dwight D. Brannon (0021657)
Attorney for Plaintiff
Six South Patterson Blvd.
Suite 300
Dayton, Ohio 45402
(513) 228-2306

MEMORANDUM

In the case at bar, lack of any established policies to select, train, assign, supervise and discipline undercover officers is the genesis of all of Plaintiff's claims. It is the failure of the City, even when placed upon notice by previous conduct, cases, comments of command officers, and the prevailing standards throughout the United States, to take any action to establish an undercover policy that has caused the genesis of these complaints. See, Affidavit of William P. Riley filed with the summary judgment motion and the deposition of Dr. Gary Marx filed on March 5, 1993. The officers acted In accordance with this non-policy and thus

joint conduct proximately produced the death of Scott Tinch.

The issues that cannot be decided without the presence of all Defendants include:

1. Lack of policy of training undercover officers.

2. Lack of supervision of undercover officers.

3. Notice of the need for training and supervision.

4. The ability to implement policy and supervision for undercover officers.

5. Duty to train and supervise within state and federal law.

6. Knowledge of existing standards for all places of undercover operations.

7. Notice of previous constitutional violations.

8. The moving force behind the death of Scott Tinch.

One single inquiry in this case dictates a denial of the motion for bifurcation: If Officers Sipes and Neville were doing exactly what they had been trained to do, or expected to do, by custom and lacking training, or if the other Defendants didn't care how they did it, and if what they did was wrong, is it solely the officer's fault? Obviously not, is the only correct answer. Therefore, bifurcation would not be for these joint tortfeasors. See, Restatement, Second, Torts, Section 876.

If the jury finds that what the officers did was wrong but that they were doing what had become the normal, expected behavior by the City of Dayton and police supervisors at the time of death, then the jury could conclude that they were following policy and orders that the officers could not control. Hence a finding of no liability could result from even a finding of wrongful conduct. That would be an unjust result. The City and their supervisors is the moving force in the issues at bar. The officers are but respondents to it or, without it, and the victim is the recipient.

In order to hold a supervisory official liable for the constitutional tort of his or her subordinants, the plaintiff must show an affirmative link between the police misconduct and the adoption of any plan or policy by the

supervisor, showing that the supervisor authorized or approved of the misconduct. Rizzo v. Goode, 423 U.S. 362, 371 (1976). Further, the supervisors can be held responsible for their own unconstitutional conduct. Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989). In Leach the Sixth Circuit Court of Appeals held:

> [Al failure of a supervisory official to supervise, control, or train the offending individuals [employees] is not actionable absent a showing that the official either encouraged or in some way directly participated in it. At a minimum, a plaintiff must show that the official at least Implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending [employees].

The testimony In the case at bar shows that the City of Dayton and the police supervisors, including the Chief of Police, failed to properly select, train, supervise or direct undercover officers. This was with the express authorization and approval of the City. The absence of such policies and procedures would be known only to the City or to the supervisory personnel. In other words, the officers would not be required to be on notice that they were operating unconstitutionally for failing to have a policy or, in following a policy of absolute abdication of

responsibility for the concerns of citizens such as the deceased in undercover operations. In other words, it Is the notice to the City and to the supervisory personnel that is the key to the proximate resulting liability of the officers. The officers in this particular case may have thought that they were following appropriate instructions. The total absence of appropriate instructions is a basis for liability and, is not only imputable to the City but is a proximate result of their failure to act.

It is clear that the Defendants, City and Chief, are responsible for promulgating rules which govern the operations, including undercover operations of the Department. The failure to train officers in undercover work and the absence of rules and regulations circumscribing such operations caused the use of excessive force which, in turn, killed Tinch. It is the position of the City of Dayton that ultimately put the individual officers in a position where they had no choice but to shoot Tinch. The basis of liability was the deficiency of training provided to these officers by the City of Dayton and the command structure of the Dayton Police Department and the failure to provide rules and regulations governing undercover operations.

It is when the execution of a government's policy or custom, whether made by its lawmakers, or those whose edicts or acts may be said to represent official policy,.inflicts the.injury that the government is responsible

under Section 1983. See, Monell v. New York City Dep. of Social Services, 436 U.S. 658 (1978). The United States Supreme Court in the case of City of Canton v. Harris, 489 U.S. 378 (1989) held that the failure to train police personnel could serve as a basis for imposing liability on a municipality in a 1983 action. In Canton v. Harris, supra, the Supreme Court indicated that the basic inquiry is whether there is a causal link between the municipal policy or custom and the alleged constitutional deprivation. Thereafter, the Supreme Court held that it was not necessary for the policy or custom itself to be unconstitutional, nor was it enough if an employee applied a constitutional policy in an unconstitutional manner. The Supreme Court in Canton v. Harris, supra stated:

> The inadequacy of policy training may serve as a basis for 1983 liability only where the failure to train amounts to deliberate indifference of the rights of persons with whom the police came into contact.

This deliberate indifference was on the part of the City of Dayton and its command officers. Officers Sipes and Neville had no choice in whether the City of Dayton, through its police department, would provide training and supervision of its undercover operations. They, further, were not the ones to whom notice of deficiency was directed. The previous decisions of the Court in Urseth v.

City of Dayton, 680 F. Supp. 1150 (1987) and other surrounding circumstances prior to this shooting were given to the City of Dayton, not to the individual police officers who were powerless to do anything about the lack of policy and training. The question before this Honorable Court is whether or not the training program is adequate and, if it is not, the question becomes whether such inadequate training can justifiably be said to represent City policy. The same goes for supervision. As the court stated in Canton v. Harris, supra:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But, it may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacies so likely to result in the violation of constitutional rights, that the policy makers of the City can reasonably be said to have been deliberately indifferent to the needs.

In that event, the failure to provide proper training may be fairly said to represent a policy for which the City is responsible, and for which the City may be held to be liable

if it actually causes injury.

All of the aforesaid is true for supervision, where supervision has been basically lacking in the area of undercover operations. In the case at bar, the Plaintiffs will need to prove that the deficiency in training and supervision with the inherent indifference, actually caused the police officers wrongful conduct to the deceased. At the very least, it was a jointly contributing factor. The query further would be whether the death would have been avoided, had Officers Sipes and Neville been trained under a program that was not deficient in the identified respects and properly supervised. This is exactly what the Supreme Court stated was necessary in Canton v. Harris, supra at page 388.

If one would review the appropriate means that was standard operating procedures for most police personnel in the United States, one would find that officers undercover should never meet with an informant (if, Indeed, that is what Vickie Grubbs was) on her own turf. They, further, would not have responded to a social service request. Finally, they would have known that they had to come out from under cover rather than risk serious bodily harm to another individual. It is the key element in the case that the officers were trained by the City of Dayton and police personnel to "hold their cover" regardless the jeopardy in which others were placed. This is not the law of Ohio.

This is not the law of the United States. Such a policy is unconstitutional and redressable under 42 U.S.C. 1983. Indeed, it could easily be argued that the individual officers have a cross-claim against the City for indemnity or their own damages.

A review of the evidence that has been placed before the Court to date indicates that there is a genuine issue of material fact as to whether the incident unfolded in such a manner as to cause the death of Scott Tinch because of inadequate training of undercover officers. The absence of such rules and regulations is apparent in the testimony of the officers, themselves. Indeed, the City of Dayton, Chief of Police and other supervisors had an affirmative duty to intercede on behalf of all citizens, including Scott Tinch, whose constitutional rights were being violated or could be violated because of the ongoing undercover operations. See, O'Neill v. Krzemiski, 839 F.2d 9, 11 (2nd Cir. 1988). The type of situation created by the City of Dayton's total disregard of any policy for training and supervision of undercover officers was inevitably bound to result in creating a situation where physical confrontation would result with a risk of excessive force being nearly inevitable. See, Bryd v. Brishke, 466 F.2d 6 (7th Cir. 1972). See, also, Monroe v. Pape, 365 U.S. 167, 187 (1961) and Restatement Second. Torts at paragraph 876.

Looking at the theory of liability against the City and the officers in one context, it is clear that the City's absence of policy, without question, was an allowance of police officers who appeared to be private individuals, unknown to the public, to act as officers when they were totally untrained and the use of excessive force under which a Fourth Amendment violation would likely arise was likely. In other words, the mere fact that these officers were operating in the manner in which they were, was the direct responsibility of the City of Dayton. The City acquiesced, condoned and ratified this conduct. This joint and concomitant conduct is the proximate producing cause of the death of Scott Tinch. The officers in this case cannot be separated from the City of Dayton and the supervisors in regard to liability. The act of the officers was a direct responsibility of the officers under the circumstances.

In this particular case, the supervisory policy or the lack of any supervisory policy, as an official custom and policy was the moving force behind the death of Scott Tinch. See, Urseth, supra. See, Languriand v Hayden, 77 F.2d 270, 27 (5th Cir. 1.983); Grandstaff v. City of Borger, Texas, 767 F.2d 161 (1985). See, Fundimiller v. City of Cooper City, 777 F.2d 1436 (1 11th Cir. 1985) where the court held:

> There need only be a causal connection between the actions of supervisory officials and alleged deprivation, which can be established when a history of wide spread use puts responsible supervisor on notice of need of improved training or supervision and supervisor fails to take corrective action.

See, also, Hardeman v. Clark, 593 F. Supp. 1285 (1984) where the court held that where there were allegations of gross negligence in hiring, training, and supervision, the practice of deliberate indifference was, in part, responsible for the injuries, there was a claim stated against the District of Columbia Chief of Police. Canton v. Harris, supra; Monell v. City of New York, supra. The City and Chief of Police can claim no prejudice as they are responsible for the mind set and actions of the officers. The complete exoneration of them in the aftermath, together with the lack of training and supervision is solely the City's choice. They can't claim prejudice or refuse to defend their inactions when it was the moving force.

In the case at bar, it is quite clear that the officers' conduct that proximately caused the death of the decedent were part of an established willful disregard of official custom or policy. Indeed, the absence of policy was the policy. The policy was the basis of the conduct. The officers could not know that their training, selection and

supervision was unconstitutional.

The officers would not have even been present had they followed the appropriate policy of not responding to the location of an Informant, not rendering aid of a social nature while doing undercover work, not providing any type of effective plan or back up and breaking cover to prevent a homicide. Indeed, the officers should not have even been there. The failure to recognize that under the laws and constitutions of the State of Ohio and United States they had a duty to protect the life of the decedent which included breaking cover in order not to do harm to him was predicated on a lack of training, makes not only the officers liable but also the City. The custom or policy of not breaking cover as established, condoned and/or tolerated by the City of Dayton and the Chief of Police, knowing full well of the potential to cause ham is the proximate cause of the death of Scott Tinch. The police officers were untrained and deliberately untrained. This is a vital element of their. wrongful conduct.

The liability issues involving the police officers, the City of Dayton and the Chief of Police are so interwoven that the liability issues cannot be separately submitted to the jury without confusion and uncertainty. This would amount

to the denial of a fair trial. United Airlines v. Wiener, 282 F.2d 302 cert. den, 366 U.S. 924, 6 L.Ed. 2d 384, 81 S. Ct. 1352 (1961). Additionally, the splitting of liability issues in the present case would disallow a proper determination of damages resulting from the conduct of all the Defendants as all Defendants herein share joint and total responsibility for the death of Scott Tinch. C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas, 411 F.2d 1379 (1969). The officers state again and again, they just acted as they had been trained. This is precisely the source of the constitutional violation. This is not a case where a well-defined firearms policy is in effect and the issue is whether or not it was violated. It is akin to a case where there is no firearms policy, no firearms training or anything else. The City is the moving force in outlining the policy, making their presence crucial. The absence of the City would be akin to starting a book in the middle.

The official customs and policies followed, by the officers in this case is in direct conflict with the State law concerning the right of the decedent to use self-defense in aid of his brother. The City and not the officers, are accountable for training the officers in such state law. The Plaintiffs would suffer tremendous prejudice if they cannot establish that the City of Dayton's official custom and policies were non-existent in this critical area and that they were placed on notice of same. It is not the Defendant

BEST AVAIL A

police officers who make custom and policy but, the City. The officers were simply following this alleged official custom and policy which was, in effect, a non-policy, even upon notice. In other words, while the officers may have acted wrongfully in causing the death of the decedent under 14 U.S.C. 1983 and 2105-02 of the Ohio Revised Code, they were certainly caused to do so because of a complete absence of necessary official custom and policy dictating how to do undercover work after due notice of same.[1]

Even if the Defendants could provide reasonable proof, instead of mere speculation, that each Defendant has separate issues involving the issue of liability, this must remain as one action as it will expedite the case and deter costs. Durham v. Southern R. Co., 254 F. Supp. 813 (1966). To bring all the same witnesses in two separate cases would be a financial burden. The joint issue of liability of all also affects the issue of damages. Heidbreder v. Northampton Township Trustees, 64 Ohio App. 2d 65, 411 N.E. 2d 285 (1979) and the footnote to Rule 42(B) of the Ohio Rules of Civil Procedure further discuss the issue of bifurcation. As the footnote states:

The absence of such a policy is almost certainly going to lead to the violation utional rights. Urseth, supra; Marx deposition; Riley affidavit.

RLE COPY

> ...but Professor Wright points out that in cases which are tried without splitting damages and liability, defendants win 42% of the time whereas in cases in which liability is tried first, the defendants win 79% of the time. Are the "expedition and economy" achieved (language of Rule 42(B)) more valuable than the results obtained? See, Wright Procedure Reform: Its Limitations and Its Future, 1 Ga. L. Rev. 563 at 569 to 570 (1967).

While the bifurcation is not one solely of damages, it is a component when the City is omitted from the jury's scrutiny while the officers, alone, are required to respond in damages. It is difficult to fault an absent tortfeasor.

The time issue is also important. This case has been pending for some four (4) years and it would appear that the case should be tried together and not piecemeal. There appears to be joint and several liability here with the City and the officers. See, Dause v. Bates (W.D. Ky. 1973), 369 F. Supp. 139. Defendants can suffer no actual prejudice, present or potential In this case, by allowing all issues to be tried at the same time. There is no proof that bifurcation would be conducive to expedition or economy as required under Federal Civil Rule 42. Discovery has been complete in the case at bar and there is going to be no savings

because of any bifurcation.

In the case at bar, bifurcation would create prejudice and confusion instead of avoiding it. In the event of bifurcation, the same evidence would be used in regards to the Defendants in one case as would be used in the other case against the different Defendants. There is no reason to believe that one hour could be gained. Indeed, more time would be expended. See, Larson v. Powell (D.C. Col. 1954), 16 F.R.D. 322; Kentucky . Graham, 473 U.S. 159 (1985); City of Canton, Ohio v. Harris, log S. C. 1197 (1988); Wilson v. Beebe, 770 F. 2d 578 (6th Cir. 1985); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Urseth v. City of Dayton, 680 F. Supp., 1150, 1551 (1986).

In Simon v. Lovgren, 368 F. Supp. 265 (1973), in which the plaintiff sought damages against the local government under the Torts Claims Act and additionally against the officer under the Civil Rights Act [42 U.S.C. 19831 for assault and battery, separation of trail was denied due to the interwoven evidence which would be submitted. This separation of trail was denied even though the Torts Claim Act was a non-jury trial and the Civil Rights violation was submitted to a jury. In Simon the court held that the judge would be able to decide relevancy as to the individual defendants, that the evidence presented would be the same as to both defendants, and that there would be no

undue prejudice in their cases.

When all of the foregoing is taken into consideration, it is clear that the failure to establish adequate undercover polices was a moving force in the death of the decedent. Further, considering that the same evidence and witnesses would be presented against all the Defendants, that there has been a four year delay in this matter, that discovery has proceeded against all Defendants, jointly, and that there is no showing of any possible prejudice to the Defendants but that there is prejudice to the Plaintiffs, the motion for separate trials should be overruled.

Respectfully submitted,

DWIGHT D. BRANNON & ASSOCIATES

Dwight D. Brannon (0021657)
Attorney for Plaintiff
Six South Patterson Blvd.
Suite 300
Dayton, Ohio 45402
(513) 228-2306

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was

served upon Neil F. Freund/Jane M. Lynch, Attorneys for Defendants, 1800 Dayton Arcade Centre, Dayton, Ohio 45402 by mailing a copy of same regular U.S. Mail this 12th day of March, 1993.

DWIGHT D. BRANNON & ASSOCIATES

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
SUPPLEMENTARY MEMORANDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	CASE NO. C-3-89-263
	)	(Judge Walter H. Rice)
vs.	)	
CITY OF DAYTON, et al., Defendants.	)	SUPPLEMENTARY MEMORANDUM TO DISMISS DEFENDANTS' MOTION TO BIFURCATE

42 U.S.C. Section 1983 provides as follows:

> Every person who under color, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizens of the United States or other persons In the jurisdiction thereof to the deprivation of any rights, privileges, or Immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceedings for

redress.

To establish a claim under Section 1983, two elements are required:

1. The conduct and controversy must be committed by a person acting under color of state law; and

2. The conduct must deprive the Plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States.

Conduct under color of state law means that the jury must find that the Defendants were acting either actually or apparently by virtue of their official capacity as an officer of the state, county, or municipality. in other words, a person must appear to be acting as an official, agent, or authority of a governmental entity.

To accomplish the second prong of the test, the Plaintiffs have submitted the Defendants committed violations of: (1) the Fourteenth Amendment of the United States Constitution which provides against governmental action without due process of law and (2) the Fourth Amendment prohibiting unreasonable searches and seizures.

Due process violations forbids governmental power and authority being used for purposes of oppression. The touch stone is the protection of the individual against arbitrary actions of government. A Defendant's actions triggers a 1983 action when the Defendant's actions constitute negligence, gross negligence, recklessness, or intentional actions which are unreasonable with disregard for a known risk or a risk so obvious that he would assume to have been aware of it and of a magnitude that is highly probable that harm will follow from it. The classic test for a substantive due process violation is conduct that shocks the conscience of the jury".

The Fourth Amendment of the U.S. Constitution protects individuals from unreasonable searches and seizures. A seizure occurs not only when an officer arrests an individual, but whenever he restrains the individual's freedom to walk away. Furthermore, an excessive use of force is deprivation of an individual's Fourth Amendment rights. The use of force of any significant degree may constitute an unreasonable seizure of a person in violation of the Fourth Amendment. The jury must look at the totality of circumstances and determine if the Defendants' actions constituted an excessive use of force using an objective reasonable standard under the facts and circumstances presented to the Defendants at the time the event occurred.

In other words, the reasonableness of the force used depends on when the actions were taken and how they were taken. To determine if they were reasonable, the jury must balance the nature and quality of the intrusion against countervailing governmental interests for the Intrusion. The jury must look at the facts and circumstances of each case, including, but not limited to, the severity of the crime the decedent alleged to have committed and whether the suspect is an immediate threat, and to determine whether the Defendants' actions are reasonable. Monroe v. Pape (1962), 365 U.S. 1 6, 5 L.Ed. 2d 492, 81 S.Ct. 473; Tennessee v..Garner (1985), 471 U.S. 1, 85 L.Ed. 2d 1, 105 S. Ct. 1694; Johnson v. Glick (1987), 481 F.2d 1028, cert. denied, Graham v. M.S. Conner (1989), 109 S.Ct. 1865, 104 L.Ed. 443; Nishiyama v. Dickenson County, Tennessee (6th Cir. 1987), 814 F.2d 277; Rochin v. California (1952), 342 U.S. 165; Parratt v. Taylor (1981), 451 U.S. 527; and 1946 St. Clair Corp. v. Cleveland (1990), 49 Ohio St. 3d 33.

To exclude the City of Dayton and its culpable conduct would be to eradicate the inquiry into the totality of the circumstances and the reasonableness of the conduct of all the Defendants. It is the totality of these circumstances, including the custom, policy, training, supervision, etc. of the City, that is the basis for the unreasonableness of the officers. The very right to interfere, stop, or cause a seizure of a person is at issue.

The probable cause to stop a driver is a factor in Fourth Amendment inquiry as to a passenger's claim of excessive force in seizure. Llaquno v. Mingey (7th Cir. 1985), 763 F.2d 1560. Probable cause to stop is an inquiry Into an unreasonable seizure. Jamieson by and through Jamieson Shaw (5th Cir. 1985), 72 F.2d 1205. This case involves even more basic inquiry than probable cause. It involves the authority to affect an individual citizen. The lack of such apparent authority under the totality of circumstances must be reviewed.

In the case at bar, it is evident that any use of force by a nonidentifiable police officer under the circumstances was unreasonable. The unreasonableness was predicated on a total absence of training, policy, procedure and supervision of undercover operations by the Defendant, City of Dayton. The decedent was in a legally superior position to use deadly force to protect himself or his brother than were the Defendants under state law. Ohio v. Williford (1990), 49 Ohio St. 3d 247. The officers had no legal right to employ unnecessary force. Indeed, their actions in the manner they precipitated the events that led to the shooting is the basis of the if unreasonableness" of the force used. To use any force under color of office against the decedent was an unlawful act upon which the liability could be founded. It was the City's deliberate indifference that had become "so permanent and well settled" as to have the force

of law. Monell v. New York City Department of Social Services (1978), 436 U.S. 658, 691.

This "force of law" which was in contravention to the law was the unreasonable conduct that proximately led to the death of Scott Tinch. It is this lack of policy that was the proximate producing cause of the injury. Indeed, it forms the basis for the claim that no officer In the position of Sipes or Neville could have employed deadly force. The very presence of the officers in the manner and mode they operated was a violation. Excessive force is not the touchstone of unreasonableness In this case, it is the very presence of officers and their use of any authority or use of force under the circumstances.

As the Court stated at pp. 15-16 in the Decision on the summary judgment motion:

> Plaintiffs' theory is not that there was the improper use of a firearm; rather the theory is the absence of training put Sipes in a position where he had no choice but to shoot Tinch. Plaintiffs support these contentions with Riley's affidavit, pp. 1 5-1 6 in the summary judgment motion.

Assuming the officer, in good faith, believed he was doing the right thing but the City had, in fact, not properly

instructed him on his rightfully legal position and he caused the death of another would entitle the decedent to bring a cause of action against the City as the moving force which placed the officer in the untenable position of not understanding when he could use force. Under those circumstances, the very presence of use of any force is an unreasonable use of force. In other words, mistaken use of force is excess force when it is derived from a reckless indifference of any selection, training, policy or procedure for undercover operations.

One of the very basis for a civil rights action is the deterrence of future abuse of powers by persons acting under color of state law. Owen v. City of Independence (1980), 445 U.S. 651; The City of Newport v. Fact Concerts, Inc. (1981), 453 U.S. 247 and Fundimiller v. City of Cooper City (11th Cir. 1985), 777 F.2d. In Fundimiller the court held that:

> A due process violation exists where rights are violated no matter what process proceeds, accompanies, or follows the unconstitutional act.

Just as this Court found in Urseth v. City of Dayton (1987), 680 F. Supp. 1150 at page 1151:

> Supervisory policy regarding the Organized Crime Unit of the Dayton Police Department [that] was so reckless or grossly negligent that future misconduct was almost inevitably or substantially certain to occur.

The jury should have a right to determine whether the City of Dayton's deliberate indifference as to undercover work, after appropriate notice pursuant to Urseth, the Lopez investigation, and the many other cases was, indeed, a constitutional violation that deserves redress. See City of Oklahoma City v. Tuttle (1980), 471 U.S. 808; City of Canton, Ohio v. Harris (1989), 489 U.S. 378. In Canton v. Harris, supra the court held that:

> The first inquiry in any case alleging municipal liability under Section 1983 is a question of whether it is a direct causal link between a municipal policy and custom in alleged constitutional deprivation. It is not whether or not there is a causal link between the custom and policy in injury but, instead, it is in regards as to whether or not there is an alleged constitutional deprivation that proximately. and inevitably would lead to an injury.

Further, in the event that the Court finds that there was a ratification of the acts of the officers by the City of Dayton

or, that there was a failure to properly investigate as part of the action against the City of Dayton then the City of Dayton must be a direct party. Edmunds v. Dillon (N.D. Ohio 1980), 485 F. Supp. 722. See, Grandstaff v. City of Borger, Texas (1985), 767 F.2d 1961 and Hayes v. Jefferson County, Ky. (6th Cir. 1982), 668 F.2d 869.

The Supreme Court in Hudson v. MacMillan - U.S.- (1992), 112 S. Ct. 995, 1000 held that a significant injury need not be pled and proven by a plaintiff who alleges excessive use of force. The very right to seizure prior to death is the inquiry here. The case at bar is very much like the use of force by a police officer in regards to a fleeing felon. Where the department has a policy that allows the shooting of a fleeing felon, the courts have nonetheless founded that policy to be an unreasonable seizure of the person, following the Fourth Amendment where there is no probable cause to believe that the suspect possesses significant threat of death or serious physical harm to the officers or others. Griffin v. Hilkey (8th Cir. 1986), 804 F.2d 1052, 1056. It is this unreasonable seizure that is the touchstone of such a tort, not that the officer followed the policy. The causes of action in this case against the Defendants include, not only excessive use of force and the proof necessary to make that claim but, also, unnecessary seizure and arresting the Plaintiff without probable cause. The appropriate jury instruction for excessive force is found

at paragraph 103-08 of Federal Jury Practice and Instructions, 4th Ed., Blackmur and Wolf. In that instruction it is clear that a person is not to be subjected to unreasonable or excessive force while being arrested by a law enforcement officers. The unreasonableness of this seizure can only be viewed in the circumstances of the lack of training and policy existing when the officers undertook that which they undertook. The totality is lost with the City absent.

The failure to include the City of Dayton would allow the officers to claim that they acted under the standing orders of the police department or under the existing policy and procedure and that would be their defense to use of excessive force. While that might not be a total defense to use of excessive force, it would be relevant on the good faith defense. Putnam v. Gerlaugh (8th Cir. 1981), 639 F.2d 418.

It is important to note that the good faith defense is not available to the City, like it is to the individual officers. See Owen v. City of Independence, Mo. (1980), 445 U.S. 365. In the case at bar, the City of Dayton attempts to bifurcate this case to the prejudice of the Plaintiffs by first showing that the officers acted in conformity with the custom and practice of the department at the time. This, even after notice and in contravention of all police standards

on undercover work, was the promulgated policy. for the officers. In other words, the officers were able to do their "own thing" and that "own thing" would not be subject to review except under arbitrary and non-specified standards. Thereupon, the good faith defense is employed by the officers, and the policy, lack of policy, is never reviewed . This in fact gives the City a good faith defense to which it is not entitled.

The firearms policy in the case at bar was promulgated for uniformed officers and non-uniformed officers who had clearly identified themselves or were in a position to identify themselves. The case at bar would allow the officers to claim that even though they committed a wrongful act under state law, they did so in conformity with what their understanding of departmental policy was or should have been. It is almost a delegation of complete authority to the undercover officers. This is exactly what has been prohibited in the many,civil rights cases that have been cited heretofore and, especially, Urseth. It was precisely the conduct of the City of Dayton which presented the Defendant. officers with the opportunity to employ the unreasonable means of seizure in the case at bar. There is no good faith argument for them. Owens, supra.

Notwithstanding the fact that there are questions surrounding the actual use of force, the identification of the

officers, and all other matters, it is clear from a review of the Decision of the Court on the summary judgment motions and the facts and circumstances of the case, that the thrust of the case is against the City of Dayton for its lack of proper selection, training, supervision and policy for undercover operations which proximately resulted in the death.

For all the foregoing reasons, it is moved that this Honorable Court not bifurcate the case due to the inherent and devastating prejudice to the Plaintiffs.

Respectfully submitted,

DWIGHT D. BRANNON & ASSOCIATES

Dwight D. Brannon (0021657)
Attorney for Plaintiff
Six South Patterson Blvd.
Suite 300
Dayton, Ohio 45402
(513) 228-2306

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Neil F. Freund/Jane M. Lynch, Attorney

for Defendants, 1800 Dayton Arcade Centre, Dayton, Ohio 45402 mailing a copy of same regular U.S. Mail this 1st day of March, 1993.

DWIGHT D. BRANNON & ASSOCIATES

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
MOTION TO OVERRULE

IN THE UNITED STATES FEDERAL DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al.,	) CASE NO. C-3-89-263
	)
Plaintiffs,	) (Judge Walter H. Rice)
	)
vs.	) MOTION FOR COURT TO
	) OVERRULE THE DECISION
CITY OF DAYTON, et al.,	) TO BIFURCATE
	) DEFENDANTS IN THE
Defendants.	) CASE AT BAR OR, IN
	) THE ALTERNATIVE, A
	) MOTION TO BIFURCATE
	) THE ISSUE OF LIABILITY
	) FROM DAMAGES

BRANCH I

Now come the Plaintiffs, by and through their attorney, and do hereby move this Honorable Court to reconsider its decision on bifurcation in the case at bar. Plaintiffs, again, in the strongest terms possible, reiterate their belief that the bifurcation in this particular case prejudices the Plaintiffs to such an extent that they are estopped from properly presenting their case in chief in the case at bar. For all the reasons set forth heretofore, and for the reason that there are no factors appearing that the Defendants Neville and Sipes are more greatly prejudiced

than are the Plaintiffs, on the record, it is moved that this Honorable Court reconsider its decision.

BRANCH II

In the alternative, in the event that this Honorable Court does not overrule its decision, it is moved that this Court allow the Plaintiffs to go forward on the issue of liability only. In this way, should the Plaintiffs be successful in the proof of their case against the officers on liability, then the issue of damages can be stayed and all Defendants present for the trial upon the Issue of damages. In that manner, the Plaintiffs are not prejudiced upon any issue of damages presented. A full and complete presentation can be made after the threshold that the Court has set for the Plaintiffs has been met in proving that there was unreasonable or excessive force used against the Plaintiffs decedent by Officers Neville and Sipes.

Further, this would greatly streamline the case and allow the Plaintiffs to concentrate upon the threshold issue that has been directed by the Court to be presented in the case at bar. Thereafter, if Plaintiffs are successful in this area, then they may present the entire case including all Defendants who would have all possible potential liability. Further, it would prevent the need for the jury, at this time, to consider any issues concerning punitive damages. The

totality of the circumstances, which would include the City, would be necessary in order to make a fair presentation of the damages.

This would greatly limit the problems confronting the Court concerning surrounding circumstances that might, or might not, be appropriate for the issue of damages which are prejudicial to the liability portion of the case and can only be tangentially justified by the Defendants in the damages. issues. This also would assist in keeping any prejudicial information from the employment and other alleged records concerning the decedent. This matter is addressed in greater detail in the accompanying motion in limine. The Defendants' memorandum of March 15, 1993 clearly sets forth the highly prejudicial and controversial issues which could be avoided by a bifurcation of liability and damages. Plaintiffs also incorporate their memorandum of the issues of alcohol and drug abuse filed heretofore.

This motion is made, not in concession, or to waive objections, of the Bifurcation of Defendants Order, previously issued by the Court but, in order to ameliorate the situation as best as possible in light of the evidentiary matters at issue. It is Plaintiffs' sincere belief that all issues should go before the Court and no bifurcation Order. However, in the event bifurcation of Defendants if Ordered, the Court should bifurcate the issue of damages from that

of liability.

Respectfully submitted,

DWIGHT D. BRANNON & ASSOCIATES

Dwight D. Brannon (0021657)
Attorney for Plaintiff
Six South Patterson Blvd.
Suite 300
Dayton, Ohio 45402
(513) 228-2306

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Neil F. Freund/Jane M. Lynch, Attorney for Defendants, 1800 Dayton Arcade Centre, Dayton, Ohio 45402 by mailing a copy of same regular U.S. Mail this 17th day of March, 1993.

DWIGHT D. BRANNON & ASSOCIATES

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
BRIEF OF THE APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 94-3436/3516

TONYA M. TINCH, Administratrix of the Estate of Scott E. Tinch; Individually as the surviving spouse of Scott E. Tinch; As parent, guardian, and next friend of Amanda M. and Justin S. Tinch, Minors,

Plaintiff-Appellant
Cross Appellee

vs.

CITY OF DAYTON; Michael J. Sipes; Russell E. Neville; James E. Newby

Defendants-Appellees
Cross Appellants

On Appeal from the United States District Court
for the Southern District of Ohio
Western Division

BRIEF FOR THE APPELLANT

Neil F. Fruend
Mary E. Lentz
Freund, Freeze & Arnold
One S. Main St., #1800
Dayton, OH 45402
(513) 222-2424
Attorney for Defendants-Appellees/Cross Appellants

Dwight D. Brannon
BRANNON & DEUTSCH
320 Regency Ridge Drive
Dayton, Ohio 45459-4215
(513) 291-3400
Attorney for Plaintiff-Appellant/Cross Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS 118

ONE PAGE FACT SUMMARY 123

TABLE OF AUTHORITIES 125

STATEMENT OF JURISDICTION 136

STATEMENT IN SUPPORT OF ORAL ARGUMENT 137

STATEMENT OF ISSUES 138

STATEMENT OF THE CASE 140

STATEMENT OF THE FACTS 143

ARGUMENT..... 147

1. THE COURT ERRED IN RULING THAT A SEPARATE CAUSE OF ACTION DOES NOT EXIST AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983 147

A. The Trial Court Abused Its Discretion Under Federal Rules Of Civil Procedure 42 In Ordering Separate Trials For The City And The Individual Officers 151

B. The Bifurcation Order, And The Ruling That The City Could Not Be Sued Directly Upon A Finding of Liability Of The Individual Officers, Undermines The Policy Behind §1983 And Must Be Reversed .. 157

C. The Bifurcation of The Trial Effectively Dismissed An Indispensable Party From The Action In Contravention of Rule 19 Of The Federal Rules of Civil Procedure 159

II. THE COURT ERRED IN RULING THAT THE SPOUSE AND CHILDREN OF SCOTT TINCH COULD NOT RECOVER DAMAGES UNDER § 1983 FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAR RELATIONSHIP 159

III. THE COURT ERRED IN LIMITING THE JURY'S COMPENSATORY DAMAGES AWARD TO HEDONIC DAMAGES 164

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR BIFURCATION UPON THE ISSUE OF LIABILITY AND DAMAGES PRIOR TO TRIAL AND THE COMMITTED FURTHER ERROR BY ALLOWING SAID BIFURCATION JUST BEFORE ARGUMENT TO THE JURY 171

V. THE COURT RENDERED NUMEROUS EVIDENTIARY RULINGS WHICH WERE IRREGULAR AND PREJUDICIAL 173

A. The Court Erred In Ruling That The Plaintiffs Were Not Entitled To A Inference Against The Defendants As A Result Of The Defendants' Destruction Of Use Of Force Reports 173

B. The Court's Admission of Evidence Relating To The Plaintiff's Employment, Marital, Or Drug History Before The Jury Determined Liability Amounted To Prejudicial Error 175

C. The Trial Court Inappropriately Allowed Questioning Of officer Barbara Long Concerning A Polygraph She Had Taken Concerning Totally Unrelated Matters 177

D. It Was Error For The Trial Court To Refused To Admit The Testimony of Defendants' Expert Witness, David Grossi, Upon Rebuttal 178

IV. THE COURT COMMITTED NUMEROUS REVERSIBLE ERRORS IN INSTRUCTING THE JURY 179

A. The Court Committed Reversible Error In Instructing The Jury That They Were Required To Find That The Defendants' Actions Were The Proximate Cause Of Scott Tinch's Death. 179

B. The Court Erred In Giving An Instruction On Punitive Damages Which Set Out A Higher Standard Than That Required Under *Smith v. Wade* And Which Resulted In Jury Confusion 185

C. The Court Inappropriately Instructed Upon The Issue Of Hedonic Damages In Both The §1983 Action And in The Wrongful Death Action Under The Applicable Law 187

D. The Court Erred When It Failed To Give Plaintiffs, Instruction On Self-Defense 188

VII. THE COURT ERRED IN HOLDING THAT THE DEFENDANTS WERE ENTITLED TO IMMUNITY FROM THE PLAINTIFFS' STATE WRONGFUL DEATH AND SURVIVAL ACTIONS 190

VIII. IT WAS INAPPROPRIATE FOR THE TRIAL COURT TO DISMISS THE CITY UPON THE ISSUE OF WRONGFUL DEATH PURSUANT TO SECTION 2744.01 PRIOR TO TRIAL 193

IX. THE JURY'S WRONGFUL DEATH AND SURVIVAL VERDICTS ARE INCONSISTENT WITH THE VERDICT OF LIABILITY UNDER § 1983 FOR A VIOLATION OF SCOTT TINCH'S FOURTH AMENDMENT RIGHTS 195

X. THE COURT ERRED IN OVERRULING THE PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR RECONSIDERATION, FOR NEW TRIAL, AND/OR TO ALTER OR AMEND JUDGMENT 198

CONCLUSION 199

CERTIFICATE OF SERVICE 200

ONE PAGE FACT SUMMARY

The City of Dayton has failed to establish any training program or devise any set of standards, rules, regulations, or procedures for undercover work by police officers. This has led to freelancing and dangerous conduct on the part of such undercover officers, as in the case at bar, which led to the use of unconstitutional force. Here, the officers created a situation where they forced another to defend himself and his brother against the undercover police officers, who used deadly force against the victim claiming that they were doing exactly what they were trained, or not trained, to do by the City.

The operative facts of this case have unidentifiable, under-cover Dayton officers on a non-police function at a non-investigation, without any prior purpose or plan, using deadly force against an individual who believed they were thugs about to execute his brother. The officers, based upon their lack of training, policies, procedures, and rules, unconstitutionally shot the deceased.

Prior to trial the court effectively dismissed the City of Dayton from the case and neither its accountability or liability was ever determined. Upon the trial of, among other things, deprivation of civil rights and wrongful death, the jury, because of the trial court's erroneous rulings,

returned a verdict against only one of the police officers for violation of civil rights, not wrongful death, and only for hedonic damages.

TABLE OF AUTHORITIES

Cases Cited:	**Page**
Acme Resin Corp. V. Ashland Oil, Inc 689 F. Supp. 751 (S.D. Ohio 1987)	152
Anderson v. Nosser 456 F.2d 835 (5th Cir.) (en banc), cert, denied, 409 u.S. 848 (1972)	181
Bach v. Penn Central Transit Co 153 Ohio St. 429 (1950)	177
Barnier v. Szentmiklosk 810 F.2d 594 (6th Cir. 1987)	178
Beardshall v. Minuteman International Press. Inc. 654 F.2d 23 (3d Cir. 1981)	185
Bell v. City of Milwaukee 746 F.2d 1205, 1232-48 (7th cir. 1984)	163, 164, 170
Berry v. City of Muskogee, Oklahoma 900 F.2d 1489 (10th Cir. 1990)	169
Brewer v. Chauvin 938 F.2d 860 (8th Cir. 1991)	166
Bolan v. Adams 19 Ohio App. 3d 206 (1984)	177

Brandt v. Mansfield Rapid Transit 177
153 Ohio St. 429 (1950)

Broan Manufacturing Co. v. Associated
Distributors, Inc 184
932 F.2d 1146 (6th Cir. 1991)

Brown & Williamson Tobacco Corp,
v. Jacobson, ... 175
827 F.2d 1119 (7th Cir. 1987)

Cameron v. City of Pontiac 182
813 F.2d 782 (6th Cir. 1987)

Carlson v. Conklin 182
813 F.2d 769 (6th Cir. 1987)

City of Canton v. Harris 175
109 S. Ct. 1197 (1989)

Colburn v. Bunge Towing, Inc 185
883 F.2d 372 (5th Cir. 1989)

Cooper v. Sisters of Charity
of Cincinnati. Inc., 177
27 Ohio St. 2d 242 (1971)

Devine v. Patterson 197
242 F.2d 838 (6th Cir. 1957)

Drayton v. Jiffee Chemical Corp 176
591 F.2d 352 (6th Cir. 1978)

Espinoza v. O'Dell 164
633 P.2d 3455 (Colo. 1981)

Estate of Bailey by Oare v.
County of New York, 163
768 F.2d 503, 509 n. 7 (3d Cir. 1985)

Fantozzi v. Sandusky Cement Prod, Co. 187
64 Ohio St. 3d 610 (1992)

Fredstrom v. Giroux Post, No. 11
of American Legion 162
94 F. Supp. 983 (W.D. Mich. 1951)

Garner v. Memphis Police Department 149
8 F.3d 358 (6th Cir. 1993)

Global Van Lines, Inc, v. Nebeker 196
541 F.2d 167 (10th Cir. 1976)

Gordon v. Norman 166,
788 F.2d 1194 (6th Cir. 1986) 171,
. 186

Graham v. Sauk Prairie Police Commission 170
915 F.2d 1086 (7th Cir. 1990)

Grandstaff v. City of Borger 164
767 F.2d 161, 172 (5th Cir. 1985)

Greene v. City of New York 164
675 F.Supp. 110 (S.D.N.Y. 1987)

Handley v. City of Seagoville Texas 170
798 F. Supp. 556 (D. Kan. 1991)

Hartzler v. Licking County Humane Society 198
740 F. Supp. 470 (S.D. Ohio 1990)

Hawkins v. Marian Corr. Institute 178
62 Ohio App. 3d (1990)

Haynesworth v. Miller 149
820 F.2d 1245, 1272 n. 227 (D.C. Cir. 1987)

Holman v. Grandview Hospital 177
37 Ohio App. 151, 157 (1987)

Hopkins v. Andaya 149
958 F.2d 881 (9th Cir. 1992)

Hopkins v. Coen 197
431 F. 2d 1005 (6th Cir. 1970)

Hytha v. Schwendeman 177
40 Ohio App. 2d 478 (1974)

In Re: Benedictin Litigation 153
857 F.2d 290, 308 (6th Cir. 1988)

Jaco v. Bloechle 166-
739 F.2d 239 (6th Cir. 1984) 171,

Johnson v. Greer 181
477 F.2d 101, 107 (5th Cir. 1973)

Jones v. Dayton Bd. of Ed 195
No. 11933 (Ohio Ct. App. 2d Dist. 1990)

Kennedy v. City of Cleveland 192
797 F.2d 297 (6th Cir. 1986)

Keyes Fibre Co. v. Packaging Corp. of America, 152
763 F. Supp. 374 (N.D. Ill. 1991)

Leatherman v. Tarrant County Narcotics
Intelligence & Coordination Unit 150
113 S.ct. 1160 (1993)

Longfellow v. City of Newark 194
18 Ohio St. 3d 144 (1985)

Mastran v. Urichich 177
37 Ohio St. 3d 44 (1988)

Mers v. Dispatch Printing Co. 178
39 Ohio App. 3d 99 (1988)

Mitchel v. Borton 191
70 Ohio App. 3d 141, 590 N.E. 2d 832 (1990)

Mitchum v. Foster 158
407 U.S. 225, 242 (1972)

Morrell v. Department of Social Services 149
436 U.S. 658 (1978)

Montalvo v. Hutchinson 176
837 F. Supp. 576 (S.D.N.Y. 1993)

Murphy v. City of Long Beach 191
696 F. Supp. 500 (1987)

Newcomb v. City of Troy 149
719 F. Supp. 1408, 1416-17 (E.D. Mich. 1989)

Osborne v. Lyles 193,
63 Ohio St. 3d 326, 587 N.E. 2d 825 (1992) 194

Parrish v. Johnson 166
800 F.2d 600 (6th Cir. 1986)

Perrin v. Anderson 164
784 F.2d 1040 (10th Cir. 1986)

Pierce v. Tennessee Coal I & R Co. 177
173 U.S. 1 (1988)

Purnell v. City of Akron 164
925 F.2d 941, 948 n. 6 (6th Cir. 1991)

Rakovich v. Wade 186
819 F.2d 1393 (7th Cir. 1987)
rev'd on other grounds, 850 F.2d 1180
(7th Cir. 1988)

Ramos v. Kuzas 188
65 Ohio St. 3d 42 (1992)

Rivas v. Freedman 149,
940 F.2d 1491 (llth Cir. 1991) 155

Robertson v. Wegmann 167-
436 U.S. 584 (1978) 171

Roman v. City of Richmond 153-
570 F. Supp. 1544 (N.D. Cal. 1983) 155

Rossano v. Blue Plate Foods, Inc 156
314 F.2d 174 (5th Cir.)
cert. denied, 375 U.S. 866 (1963)

Rymer v. Davis 154
754 F.2d 198 (6th Cir., 1985,
vacated on other grounds, City of
Shepherdsville, Kentucky v. Rymer,
473 U.S. 901 (1986)

Samples v. City of Atlanta 154
916 F.2d 1548 (llth Cir. 1990)

Savarese v. Aariss 187
883 F.2d 1194 (3d Cir. 1989)

Schmind v. Milwaukee Elec. Tool Corp 176
13 F.3d 76 (3d Cir. 1994)

Scothorn v. State 170,
772 F. Supp. 556 (D. Kan. 1991) 171

Sharp v. State 190
19 Ohio 379 (1850)

Sherlock v. Klempay Brothers 178
167 Ohio App. 3d 324 (Hamilton Cty. 1984)

Smith v. City of Montana 164
818 F.2d 1411, 1417-20 (9th Cir. 1987)

Smith v. Wade 186-
461 U.S. 30 (1983) 187

Soffer v. City of Costa Mesa 149
798 F.2d 361, 363

Spell v. McDaniel 176
591 F. Supp 1090, 1115 (E.D.N.C. 1984),
aff'd, 824 F.2d 1380 (4th Cir. 1987)

State v. Liberatore 176
69 Ohio St. 2d, 493 N.E. 2d 561 (1982)

State v. Sheets 190
115 Ohio St. 308 (1926),

State v. Willford 190
49 Ohio St. 3d 247 (1990)

Stenael v. Belcher 172
522 F.2d 438, 444 (6th Cir. 1975)

Tracy v. Bittles 171
820 F. Supp. 396 (N.D. Ind. 1993)

United States Gypsum v. Schiavo Brothers, Inc. 156-
668 F.2d 172 (3d Cir. 1981) 157
cert. denied, 465 U.S. 961 (1982)

Urseth v. City of Dayton 159
680 F. Supp. 1150, 1151 (S.D. Ohio 1987)

Walsh v. Mellas 186
837 F.2d 789 (7th Cir. 1988),

cert. denied, 108 S.Ct. 2832 (1988)

Ward v. City of San Jose
737 F. Supp. 1502 (N.D. Cal. 1990)
modified on other grounds, 967 F.2d 287
(9th Cir. 1992) 154, 181, 182, 198

Weis v. Weis 177
147 Ohio St. 416 (1947)

Wheatley v. Beetrar 151
637 F.2d 863, 867-68 (2d Cir. 1980)

Willard v. The John Hayward 196
577 F.2d 1009 (5th Cir. 1978)

Witco Chemical Corp. v. Peachtree Doors, Inc . . . 154
787 F.2d 1545 (llth Cir. 1986)
cert. dismissed, 479 U.S. 877 (1987)

Wolfel v. Holbrook 178
823 F.2d 970 (6th Cir. 1987)

Wood v. Holiday Inns, Inc 196
508 F.2d 167 (5th Cir. 1975)

Yates v. Cleveland 190
941 F.2d 444 (6th Cir. 1991)

Zanesville v. Sheets 179
38 Ohio App. 3d 24 (1987)

Constitutional Provisions:

Ohio Constitution, Article I, Par. 16 194
Ohio Constitution, Article I, Par. 19 194

Statutes:

42 U.S.C. § 1983 136,
1 4 1 ,
143,147,149,150,153,157,158,159,161,162,163,164,165,
166,167,168,169,170,181,182,183,184,185,186,187,188,
192, 194- 195, 197-200

Ohio Revised Code §2307.60 194
Ohio Revised Code §2744.01 194
Ohio Revised Code §2744.03 (A) (6) 192
Ohio Revised Code §2929.45 195
Ohio Revised Code §3919.05 177
Ohio Revised Code §4112.99 195

Other Authorities:

Fed. R. Civ. P., Rule 8(C) 191
Fed. R. Civ. P., Rule 19(a)(1) 17,19
Fed. R. Civ. P., Rule 42 27
Fed. R. Civ. P., Rule 51 184

Fed. R. Ev. Rule 101 177
Fed. R. Ev. Rule 104 177
Fed. R. Ev. Rule 105 177
Fed. R. Ev. Rule 201 177
Fed. R. Ev. Rule 401-406 177
Fed. R. Ev. Rule 403 177
Fed. R. Ev. Rule 501 177
Fed. R. Ev. Rule 701 177
Fed. R. Ev. Rule 802 177
Fed. R. Ev. Rule 803 177
Fed. R. Ev. Rule 803(6) 177
Fed. R. Ev. Rule 805 177
Fed. R. Ev. Rule 901 177

Civil Rights and Civil Liberties Litigation 181
§ 3.24 at 250 (2d. ed. 1986)

Civil Rights and Civil Liberties Litigation 182
§ 3.24 at 252 (2d ed. 1986)

Civil Rights and Civil Liberties Litigation 181
§ 3.24 at 252 (3d ed. 1992)

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Ohio, Western Division, had jurisdiction over the plaintiffs, claims pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §1343 (a) (3), and exercised supplemental or pendent jurisdiction over claims arising under state law. Jurisdiction over the parties existed, and the venue was proper in the United States District Court for the Southern District of Ohio, Western Division.

A final judgment was entered against the Plaintiffs by the United States District Court for the Southern District of Ohio, western Division, on March 17, 1994, Thus, the Court of Appeals for the Sixth Circuit has jurisdiction in this case pursuant to 28 U.S.C. §1291.

The Plaintiffs filed a timely appeal in the United States District Court for the Southern District of Ohio, Western Division, on April 15, 1994.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants strongly urge this Honorable Court to allow oral argument of this case. The limitations of a written brief cannot possibly discuss the extent, nature, and prejudicial effect of the errors committed in the trial court. This four-week trial was extremely difficult for Appellants as the court committed numerous evidentiary and legal errors which permeated the record and chilled the efforts to relay the case to the jury. The low trial verdict for the Appellants reflect the effect of the errors at trial.

The appellate court can better appreciate the facts, the effect of the errors, if it is sufficiently presented to the appellate court by oral argument. Much additional insight can be given to the trial court by the counsel who experienced the errors within his own five senses. The terrible injustice done in the trial below deserves a voice to supplement the brief.

STATEMENT OF ISSUES

I. THE COURT ERRED IN RULING THAT A SEPARATE CAUSE OF ACTION DOES NOT EXIST AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983.

II. THE COURT ERRED IN RULING THAT THE SPOUSE AND CHILDREN OF SCOTT TINCH COULD NOT RECOVER DAMAGES UNDER § 1983 FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAL RELATIONSHIP.

III. THE COURT ERRED IN LIMITING THE JURY'S COMPENSATORY DAMAGES AWARD TO HEDONIC DAMAGES.

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR BIFURCATION UPON THE ISSUE OF LIABILITY AND DAMAGES PRIOR TO TRIAL THEN COMMITTED FURTHER ERROR BY ALLOWING SAID BIFURCATION JUST BEFORE ARGUMENT TO THE JURY.

V. THE COURT RENDERED NUMEROUS EVIDENTIARY RULINGS WHICH WERE IRREGULAR AND PREJUDICIAL.

VI. THE COURT COMMITTED NUMEROUS REVERSIBLE ERRORS IN INSTRUCTING THE JURY.

VII. THE COURT ERRED IN HOLDING THAT THE DEFENDANTS WERE ENTITLED TO IMMUNITY FROM THE PLAINTIFFS' STATE WRONGFUL DEATH AND SURVIVAL ACTIONS.

VIII. IT WAS INAPPROPRIATE FOR THE TRIAL COURT TO DISMISS THE CITY UPON THE ISSUE OF WRONGFUL DEATH PURSUANT TO SECTION 2744.01 PRIOR TO TRIAL.

IX. THE JURY'S WRONGFUL DEATH AND SURVIVAL VERDICTS ARE INCONSISTENT WITH THE VERDICT LIABILITY UNDER § 1983 FOR A VIOLATION OF SCOTT TINCH'S FOURTH AMENDMENT RIGHTS.

X. THE COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR RECONSIDERATION, FOR NEW TRIAL, AND/OR TO ALTER OR AMEND JUDGMENT

STATEMENT OF THE CASE

On June 19, 1989, Tonya Tinch, the surviving spouse of Scott Tinch filed suit on behalf of the estate of Scott Tinch, on behalf of herself individually, and on behalf of Amanda and Justin Tinch, the two minor children of Scott Tinch. Named as Defendants were the City of Dayton, Russell Neville, Michael Sipes, the mayor of the City of Dayton Richard Dixon, the chief of police James Newby and the Dayton City Commissioners Anthony Capizzi, Abner Orick and Mark Henry. In the suit Plaintiffs sought compensatory and punitive damages under 42 U.S.C. §1983, for violation of Scott Tinch's Fourth, Fifth, Sixth, Eight and Fourteenth Amendments, as well as pendent state claims for wrongful death and survival.

On September 18, 1990, Plaintiffs filed their motion for summary judgment. On May 14, 1992 a Decision was rendered by the trial court. Subsequently a trial date was scheduled for March 15, 1993 on Plaintiffs, claims, including claims for excessive force against Neville and Sipes, for Plaintiffs, § 1983 claims against the City and Newby for failure to train and the maintenance of a custom or policy, or lack thereof, directly and proximately resulting in the death of Scott Tinch, for Plaintiffs, claims for punitive damages against Neville, Sipes and Newby and for Plaintiffs, claims for survival action against Neville, Sipes,

Newby, and the City, together with the pendent state claims for wrongful death and survival. As to the City of Dayton, there were claims for failure to adequately train officers and that the failure caused Scott Tinch's death through the use of excessive force and the absence of rules, regulations and standards through the City of Dayton, which circumscribe the operations of undercover officers, is a custom or policy of Dayton which caused the death of Tinch through excessive force, together with the pendent state claims for wrongful death and survival. Plaintiffs proceeded to prepare their case for trial on the foregoing issues. On March 3, 1993, a mere week before the trial was scheduled to begin, Defendants filed a motion to bifurcate the trial. Plaintiffs responded to Defendants, motion on March 12, 1993 and on the same date filed a motion to continue the trial if the bifurcation were allowed. The trial court granted Defendants' motion to bifurcate the trial and overruled Plaintiffs, motion to continue the trial.

Just prior to the trial, after several adverse rulings on motions in limine, the Plaintiffs made a motion to the Court to bifurcate the liability issues from the damages issues. That motion was overruled. The trial court later bifurcated the liability and damages issue just prior to closing argument over objection of Plaintiffs.

On March 18, 1993, trial began before a jury. On April 8, 1994, the jury returned a verdict against Michael Sipes for use of excessive force and in a subsequent determination awarded the Plaintiffs the sum of $111,000.00 against Sipes on the § 1983 claim. For various errors as assigned hereafter, the jury failed to award a verdict against the other Defendants or for any other causes of action. The Plaintiffs immediately moved the court to alter or amend judgment, for judgment notwithstanding the verdict, and for further relief which the trial court overruled. The trial court entered a final judgment on April 20, 1993. Plaintiffs, thereafter filed formal Motions for Judgment Notwithstanding the verdict, to Alter or Amend Judgment, for a New Trial, and other relief which was overruled by the trial court. Subsequent rulings on motions for attorney fees and other relief were also overruled all to the prejudice of Plaintiffs. Plaintiffs filed their Notice of Appeal on April 15, 1994 to this Honorable Court from the trial court's final judgment upon all said motions on March 17, 1994.[1]

---

[1]The Court in a ruling on fees stayed the consideration of same until after the appeal, but made it clear counsel could receive much less in fees than reasonably expected because of the trial court's ruling and possible adverse rulings by the appellate court. (See Decision of April 20, 1993).

STATEMENT OF THE FACTS

On June 17, 1987, Russell Neville and Michael Sipes were undercover detectives for the Dayton Police Department. On that date, one Vickie Grubbs, who had previously been an informant for Det. Neville, telephoned him on his voice pager and asked him to meet her at 2147-1/2 East Third Street in to provide assistance to her sister, Rhonda Grubbs in a matter unrelated to police investigations. (T. Vol. 10, Grubbs, p. 40, 44, 76). The detectives proceeded to the location requested. At that time they were shabbily dressed in blue jeans and t-shirts. They were not recognizable as police officers (T. Vol. 5, Bertsch, p. 52; T. Vol. 7, Sipes, p. 152; Videotape (Plaintiffs' Exhibit #10)).

Michael Sipes had been an undercover officer for approximately four months and the only undercover training he had received was allegedly approximately two hours at the Dayton Police Academy some nine years earlier. (T. Sipes, Vol. 7, p. 123, 124, 125). Russell Neville had received no training from the Dayton Police Academy for undercover work. (T. Vol. 8, Neville, p. 21). In fact, the City of Dayton had no policy, procedures, rules, regulations, or training for undercover work.

Upon arriving at 2147-1/2 E. Third Street, the detectives saw Rhonda Grubbs unconscious on the porch, stepped over her and entered the kitchen of the house where they were informed by one Jay Coover that Grubbs was in the back room. The detectives decided to do nothing but wait for her in the kitchen without identifying themselves.

On that same night two brothers, Shaun and Scott Tinch were in the vicinity looking for a Robert Kinder and, shortly after detectives Neville and Sipes arrived at 2147-1/2 E. Third Street, Shaun Tinch entered the premises and proceed to the back room to see Vickie Grubbs. Shaun believed that Ms. Grubbs knew the location of Robert Kinder. (T. Vol. 8, Tinch, p. 120). As Shaun entered the house the detectives noticed a bulge under his shirt, which was later identified to be a flashlight. At that time the officers did nothing and allowed Shaun to continue into the back room where Vickie was. (T. Vol. 7, Sipes, p. 161-162). Immediately following this, Scott Tinch entered the kitchen. He was carrying an ax handle at his side. Scott Tinch approached Det. Neville and said "what's happening .... what's happening" and then proceeded to the back room where he stayed shortly and then came back through the kitchen and exited the house.

Shaun Tinch remained in the back room and argued with Vickie Grubbs for a short period of time. Grubbs and Shaun Tinch then entered the kitchen and Grubbs threatened to call the police. With some difficulty, she recognized Det. Neville and identified Neville and Sipes as police officers to Shaun Tinch. At that point, both detectives identified themselves as Dayton Police officers to Shaun Tinch by pulling their badges and taking out their guns, pointing them at Shaun Tinch. Immediately Shaun Tinch put his hands into the air and complied with the detectives, request to get on his knees with his hands behind his head. (T. Vol. 7, Sipes, pp. 176-177, 211; T. Vol. 8, Neville, p. 71; T. Vol. 8, Tinch, p. 132). Detective Sipes removed a flashlight from Shaun's pants and placed his badge back into his pants pocket. (T. Vol. 7, Sipes p. 177). At no time was Shaun Tinch ever placed under arrest. (T. Vol. 7, Sipes, p. 176; T. Vol. 8, Neville, p. 76).

Scott Tinch was out of the house at this point in time and could not have heard the conversation. Within seconds, Scott Tinch re-entered the house. obviously, not knowing that Sipes and Neville were police officers, he could only have seen that his brother was on the floor in an execution style and that two men were holding a gun to his head. Shaun Tinch, as well as independent witnesses have testified that Det. Neville and Sipes did

not identify themselves as police officers to Scott Tinch (T. Vol. 4, Coover, pp. 155, 156, 175; T. Vol. 4, Dardio, pp. 179, 180; T. Vol. 5, Bertsch, p. 18, p. 41; T. Vol. 8, Tinch, p. 137, 140, 161, 203). Scott Tinch proceeded to rush into the room to defend his brother. Tinch grabbed Det. Sipes' arm as Neville struck him on the head with a gun. Tinch never struck the officer with the stick but, lost it as the two tusselled to the ground. After Tinch and Sipes were on the ground, Sipes fired a shot, killing Tinch. At the time the shot was fired Sipes was not in danger for his life and the two detectives could have easily overcome Tinch. The officers did not truthfully relate the facts of the shooting and both an investigating officer and coroner deemed the shooting to be a "bad shoot". (T. Vol. 9, R. Tinch, pp. 95, 98; T. Vol. 9, C. Tinch, p. 128).

ARGUMENT

I. THE COURT ERRED IN RULING THAT A SEPARATE CAUSE OF ACTION DOES NOT EXIST AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983.

In the proceedings below, the district court based its late decision to bifurcate this action on the erroneous ruling that an excessive force plaintiff cannot bring an action directly against a city for constitutional deprivations proximately caused by municipal custom or policy.[2]

---

[2]The court stated during the trial than an unconstitutional "[c]ustom or policy, the failure to train, is not a separate constitutional tort; it is a nexus, it is a bridge by which the acts of the tortfeasors can be attributed to or imputed to the City' (R-154 Transcript of Proceedings dated March 12, 1993 at p. 15).

Furthermore, in the court's post-trial memorandum the court stated that l[t]his court has labored mightily, but without apparent success, to convince Plaintiff's attorney that there exists no separate constitutional tort, against the City of Dayton and its Chief of Police, for their alleged failure to adequately train undercover police officers and/or for their failure to have policies and procedures in effect governing undercover policy operations engaged in by these officers. Indeed, the issue of inadequate training, as well as

The basis for the court's decision conflicts with the controlling precedent.

In Monell v. Department of Social Services 436 U.S. 658 (1978), the Supreme Court held that a municipality is a person within the meaning of 42 U.S.C. § 1983 and may be sued directly under that statute. The plaintiff in a § 1983 suit may proceed directly against the local government unit, making a suit against local officers unnecessary except where officials are sued in their personal capacity. *Soffer v. City of Costa Mesa,* 798 F.2d 361, 363 (9th Cir. 1986).

This Court has recently held that a suit directly against a municipality survives even the dismissal of the individual officers. *Garner v. Memphis Police*

---

the lack of policies and procedures, far from being separate constitutional tort, operates only as a vehicle (or conduit) for the imputation of any liability found against the individual officers, for having committed a constitutional tort, to the ultimate supervisor of those officers and their employer, the City of Dayton., (R. 139 Order Indicating Court's Intentional to Ultimately Enter Judgment in Favor of the Plaintiff and Against the Defendant Sipes, dated Apr. 20, 1993, at page 2-3). The court's belated attempt in its final order to distance itself from this erroneous reasoning is of little consequence; the plaintiff was clearly prejudiced despite the window dressing now put on the error.

Department, 8 F.3d 358 (6th Cir. 1993). This Court stated clearly that "[a] municipality may not escape liability for a § 1983 violation merely because the officer who committed the violation is entitled to qualified immunity." *Id.* at 365. *See, also, Newcomb v. City of Troy,* 719 F. Supp. 1408, 1416-17 (E.D. Mich. 1989); *Hopkins v. Andaya,* 958 F.2d 881 (9th Cir. 1992); *Rivas v. Freeman,* 940 F.2d 1491 (llth Cir. 1991); *Haynesworth v. Miller*, 820 F.2d 1245, 1272 n.227 (D.C. cir. 1987).

The Supreme Court has also made it quite clear than an independent action may be maintained against a municipality under § 1983. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 113 S.Ct. 1160 (1993). In rejecting the argument that municipalities enjoyed some worth of immunity from suit, the Court stated as follows: "In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury. Id. at 4206.

In the instant case, the trial court stated that the Plaintiffs "can make a very persuasive argument that this man didn't have to die, that he died because of the lack of a set of standards and a set of policies for these types of police officers because the lack of policy, the

freelancing of the police officers, is what put them there in the first place where the incident could occur." (R.154 Transcript of Proceedings dated March 12, 1993 at p. 18) Yet the court's erroneous belief that such a policy could not form the basis of a constitutional tort pervaded its view of the case and lead to the court's bifurcation order, which by virtue of the court's subsequent rulings, was essentially a dismissal of the city from the case.

Precedent from the Supreme Court and the Sixth Circuit Court of Appeals indicates that an independent action against a municipality exists under § 1983 where, as in the instant case, a municipal custom or policy causes constitutional injury. The ruling of the district court to the contrary in the case at bar was erroneous, and this error permeated its analysis of the bifurcation issue discussed, infra. To remedy this error, the Plaintiffs should be allowed to proceed against the city, or a new trial should be granted with both the city and the individual officers as defendants.[3]

---

[3] Because there is no reason to disturb the finding of liability of
Sipes, the jury should be instructed that his liability has already been determined. *See, Wheatley v. Beetrar*, 637 F.2d 863, 867-68 (2d Cir. 1980) (holding that, although new trial on damages was required in an action bifurcated between liability and damages, jury would be instructed that

A. The Trial Court Abused Its Discretion Under Federal Rules Of Civil Procedure 42 In Ordering Separate Trials For The City And The Individual officers

In the instant case, the court bifurcated the issue of the liability of the individual officers and the liability of the city at the very last moment before trial. As the following shows, the bifurcation order was improper and should be reversed.

Although the decision to bifurcate trials is within the discretion of the court, a district court should not routinely order separate trials notwithstanding this discretion. *Keyes Fibre Co. v. Packaging Corp. of America,* 763 F. Supp. 374 (N.D. Ill. 1991). In making the decision to order bifurcation, the trial court must consider whether separate trials would be conducive to expedition of litigation and to efficient judicial administration, whether separate trials would prejudice the parties, and whether the issues sought to be tried separately are significantly different. *Acme Resin Corp. v. Ashland Oil, Inc.,* 689 F. Supp. 751 (S.D. Ohio 1987).

Although no precise rules have been formulated to

---

the defendant's liability has already been established).

determine where bifurcation is appropriate, "[c]ourts, including our own, have measured trial court decisions to try issues separately by whether fairness was advanced in the particular case." *In re Benedictin Litigation*, 857 F.2d 290, 308 (6th Cir. 1988).

In *Roman v. City of Richmond*, 570 F. Supp. 1544 (N.D. Cal. 1983), the heirs of a man shot and killed by police brought an action under § 1983 against the individual officers and the city. The case was tried to a jury which found the individual officers and the city liable. The defendants moved for a new trial, claiming that the "failure to separate for trial evidence of the liability of the individuals from evidence of the liability of the supervisors and city, prejudiced their trial." Id. at 1553. The court rejected this argument, stating in relevant part, as follows:

> [j]udicial economy was clearly served by consolidation of those actions .... Additionally, because the custom or policy, as defendants have so adamantly asserted in these motions, must cause the constitutional violation, there was no error in showing how these customs and policies led up to the ultimate deprivations of life. These customs and policies also pertain to the reasonableness of the actions taken by the officers

involved in the deprivations.

Id. The ruling in *Roman* is further supported by the fact that the individual defendants and municipal defendants are commonly tried together in excessive force cases. See, e.g., *Rymer v. Davis*, 754 F.2d 198 (6th Cir. 1985), vacated *on other grounds, City of Shepherdsville, Kentucky v. Rymer*, 473 U.S. 901 (1986); *Ward v. City of San Jose* 737 F. Supp. 1502 (N.D. Cal. 1990), *modified on other grounds,* 967 F.2d 287 (9th Cir. 1992).[4]

In the case at bar, as in *Roman,* the issue of the individual officers, liability and the city's liability was intertwined. Indeed, a central theory in the instant case was that the utter failure of the city to train officers in undercover work unnecessarily placed the officers in situations where they would have to use constitutionally impermissible force to save their own lives. *Cf.* ***Rivas v. Freeman,*** 940 F.2d 1491 (llth Cir. 1991). Thus, under the theories advanced in the case at bar, much of the same evidence was admissible against both the city and the individual officers. Where the factual underpinning

[4] 0n the few occasions that bifurcation is allowed the cause of action against the municipality does not disappear, as the district court erroneously believed in the case at bar. *See, Samples v. City of Atlanta,* 916 P.2d 1548 (llth Cir. 1990).

of two issues are indistinguishably woven together, it is inappropriate to order bifurcation of those issues. *Witco Chemical Corp. v. Peachtree Doors, Inc.*, 787 F.2d 1545 (llth Cir. 1986) , *cert. dismissed,* 479 **U.S.** 877 (1987). The factual underpinnings of individual and municipal liability to the case at bar were clearly intertwined. Therefore, bifurcation was inappropriate.

An examination of the other factors bearing on the propriety of bifurcation reveals no relevant consideration favoring separate trials. As the court noted in *Roman,* while separate trials may seem at first glance to be conducive to judicial economy, further analysis, and practical experience, demonstrates that consolidation, rather than bifurcation, is the more efficient means of trying an excessive force claim against individual and municipal defendants. Furthermore, as in the case at bar, any increased efficiency is derived not from the mere separation of issues; rather, it results from denying the plaintiff the full measure of available relief.

The procedure employed by the district court in the case at bar is inherently prejudicial to the Plaintiffs. The only reason advanced or considered by the court in bifurcating the trial in the case at bar, was that a potential finding of liability of the individual officers would prejudice the city, or vice versa. The touchstone in

reviewing bifurcated proceedings however, is whether the party bearing the burden of proof was unfairly prejudiced by the procedure employed. *United States Gypsum v. Schiavo Brothers, Inc.*, 668 F.2d 172 (3d Cir. 1981), *cert. denied*, 465 U.S. 961 (1982). While conservation of time and money are a basis for bifurcation, if trial on a limited issue is prejudicial to the objecting party, there has been an abuse of discretion which should be reversed. *Rossano v. Blue Plate Foods, Inc.*, 314 F.2d 174 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963). The court did not take into account the resulting prejudice to the plaintiff.

The bifurcation in the case at bar prejudiced the Plaintiffs in many respects. First, as noted above, the order effectively denied any relief against the city. Thus, although the Plaintiffs had ample proof to support their allegations that the city's reckless disregard in failing to provide training, policy, rules or regulations to undercover officers caused the death of Scott Tinch, the Plaintiffs were denied any relief against the city.

The Plaintiffs were also prejudiced by the fact that they were prevented from introducing evidence at the trial of the individual officers which could be properly considered by a jury on the issue of the individual liability, merely because the evidence was deemed to relate to municipal liability. The entire testimony of Dr.

Marx was related to both individual officer and municipal liability (T. Vol. 4, pp. 189-197).

Even if bifurcation of the issues was initially appropriate, which it clearly was not, the court abused its discretion in issuing the bifurcation order only one week before trial. Despite the fact that the bifurcation order necessitated a radical change in the Plaintiffs, trial strategy, the court refused to grant Plaintiffs additional time to prepare for a bifurcated trial. (R. 165, Transcript of Pre-Trial Discussion dated March 125, 1993 at p. 35-37, 48). Thus, the Plaintiffs, as the parties bearing the burden of proof, were clearly unfairly prejudiced by the procedures employed in bifurcating the trial. *See* *United States Gypsum v. Schiavo Brothers, Inc., supra.*

As the foregoing discussion shows, none of the relevant considerations weighed in favor of bifurcating the trial in the case at bar. Thus, the court abused its discretion in bifurcating the trial, and the Plaintiffs are entitled to a new trial against both the municipal and individual defendants.

B. The Bifurcation Order, And The Ruling That The City Could Not Be Sued Directly Upon Finding of Liability Of The individual Officers, Undermines The Policy Behind §1983 And Must Be Reversed.

When the individual officers were found to have violated the Plaintiffs, rights, the trial court then ruled that the Plaintiffs had no right to proceed against the city. Such a procedure not only makes full recovery by a plaintiff unlikely, it also undermines a fundamental purpose of § 1983 - to provide a mechanism for enforcement of individual civil rights. As the Supreme Court has noted, 11 [t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). By preventing private parties from proceeding against municipalities guilty of reckless disregard for the constitutional rights of their citizens, the court directly undermines this policy. Moreover, by insulating a city from liability, the court destroys the deterrent effect of § 1983.

In the case at bar, the court's rulings prevented the Plaintiffs from obtaining injunctive relief designed to

prevent further constitutional deprivations. It is not mere speculation to assert that, in the absence of such relief, similar constitutional deprivations will continue. As the trial court noted in *Urseth v. City of Dayton,* 680 F. Supp. 1150, 1151 (S.D. Ohio 1987), the jury in that case found that the "supervisory policy regarding the organized crime unit of the Dayton Police Department . . . was so reckless or grossly negligent that future misconduct was almost inevitable or substantially certain to occur." As the evidence in the case at bar demonstrates, little has changed in the Dayton Police Department since the decision in *Urseth,* despite the fact that the city was ultimately liable for a judgment in favor of the plaintiff's widow.[5]

It is by no means farfetched to assert that a finding of liability and injunctive relief against the city is an important element of relief in the case at bar. Not only is this relief important to the particular Plaintiffs in the

---

[5] The City of Dayton has been recently inundated with suits, such as where the Dayton detective used a hot iron to extract a confession; were a Dayton detective murdered a known drug dealer with a machine gun while off-duty; the assault of a suspect by multiple officers in a court hallway, etc., etc. The insulation of the City by the federal court through these bifurcation rulings can well be alleged to be a contributing factor.

case at bar, but this relief is necessary to effectuate the purpose of § 1983. Therefore, any procedure which prevents such relief, such as the procedure used in the instant case, must be rejected as contrary to the intent and purpose behind § 1983. It has a chilling effect upon § 1983 relief.

C. The Bifurcation of the Trial Effectively Dismissed An Indispensable Party From The Action In Contravention Of Rule 19 Of The Federal Rules Of Civil Procedure.

Rule 19 of the Federal Rules of Civil Procedure provides for the joinder of persons needed for a just adjudication of a case. The rule provides in relevant part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties[.]

Fed. R. Civ. P. 19 (a)(1).

In the instant case, the City of Dayton qualifies as an indispensable party under Rule 19 (a) (1) . First, the

city is subject to service of process, and the city's joinder in the action would not deprive the court of subject matter jurisdiction. In fact, the city was actually served and was joined as a party to this action until the judge bifurcated the trial and dismissed the city from the action.

The bifurcation was error, however, because of the city's status as an indispensable party under Rule 19. As previously adverted to, the bifurcation order was, in effect, a dismissal of the city as a party due to the judge's related ruling that a municipality could not be sued directly under § 1983.[6] According to the rule, if,

---

[6] The court considered the bifurcation to remove the city from the lawsuit. In its preliminary entry the court stated:

> Only in the event that the City would refuse to do that which the law requires (in the sense of indemnifying Officer Sipes), would an action against the City, in any form, be a legally viable alternative.

(R.139 Order Indicating Court's Intention to Ultimately Enter Judgment in Favor of the Plaintiff and Against Defendant Sipes, dated April 20, 1993 at p. 4). Furthermore, almost from the beginning of the proceedings, the court had indicated its intention to rely on the theory that the city could be tried only if it refused to indemnify any verdict obtained against an individual defendant. (*See, e.g.* R. 153 Transcript of Proceedings, dated Mar. 9, 1993

in the absence of the city, complete relief cannot be accorded among those already parties, then the action should be dismissed. The reason complete relief cannot be accorded among those already parties is that the individual officers involved have no power to grant the Plaintiffs relief from the unconstitutional practices of the city police force. In other words, the individual officers can only be liable to the Plaintiffs for the claimed money damages caused by their § 1983 violation. However, the Plaintiffs sought to obtain declaratory and injunctive relief.

By asking the court to declare that the city's policies in regard to undercover officer training and deployment were constitutionally inadequate, and to enjoin the city from allowing the inadequate training and lack of standards to continue, the Plaintiffs were requesting relief against the city that only the city could provide. The judge's decision to bifurcate the trial and dismiss the city from the action against the officers denied the Plaintiffs the opportunity to obtain a declaration or injunction against the city. This approach is counter to the ultimate goals of § 1983 as well as Rule 19.

---

at p. 17-18).

In effect, then, the judge's decision to bifurcate the trial was a decision to dismiss a party whose presence was indispensable to a just adjudication of the case. It has been held that the absence of an indispensable party precludes a court from proceeding with a case. *Fredstrom v. Giroux Post No. 11 of American Legion,* 94 F. Supp. 983 (W.D. Mich. 1951). Therefore, the decision to bifurcate the trial and proceed without the indispensable party of the city was an abuse of the judge's discretion and amounts to reversible error.

II. THE COURT ERRED IN RULING THAT THE SPOUSE AND CHILDREN OF SCOTT TINCH COULD NOT RECOVER DAMAGES UNDER § 1983 FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAL RELATIONSHIP.

Tonya M. Tinch brought suit in the following capacities: (1) as the administratrix of the estate of Scott Tinch; (2) individually as surviving spouse of Scott Tinch; (3) as parent and next friend of Amanda Marie Tinch; and (4) as parent and next friend of Justin Scott Tinch. The court ruled that the Plaintiff could only maintain suit in her capacity as administratrix of the estate of Scott Tinch, and rejected the claims by the

children and spouse relating to, inter alia, their loss of companionship.

It is now generally acknowledged that a surviving family member can maintain an independent action for damages under § 1983 where the unconstitutional actions of law enforcement officials caused the death of a parent or spouse. *Smith v. City of Montana,* 818 F.2d 1411, 1417-20 (9th Cir. 1987); *Perrin V. Anderson,* 784 F.2d 1040 (10th Cir. 1986); *Estate of Bailey Oare v. County of New York,* 768 F. 2d 503, 509 n. 7 (3d Cir. 1985) ; *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985); *Bell v. City of Milwaukee,* 746 F.2d 1205, 1232-48 (7th Cir. 1984). Courts have specifically recognized a right to recover for a deprivation of a constitutional liberty interest in a continuing family relationship. *Greene v. City of New York*, 675 F.Supp. 110 (S.D.N.Y. 1987); *see also Espinoza v. O'Dell*, 633 P.2d 3455 (Colo. 1981).

As a panel of the Sixth Circuit Court of Appeals recently noted, 11[t]he legislative history of section 1983's precursor, the Ku Klux Klan Act of 1871, provides support for these cases." *Purnell v. City of Akron,* 925 F.2d 941, 948 n. 6 (6th Cir. 1991). Although the court in Purnell. declined to "address the merits of the difficult question of whether the children of [the

decedent] could state a claim for damages under 1983 based on the killing of their father," the court clearly indicated that such a cause of action may be recognized in the Sixth Circuit. Id.

Thus, the court's ruling that the spouse and children of Scott Tinch could not recover damages under § 1983 for the deprivation of their liberty interest in a continuing familial relationship should be reversed and a new trial granted.

III. THE COURT ERRED IN LIMITING THE JURY'S COMPENSATORY DAMAGES AWARD TO HEDONIC DAMAGES.

In the case at bar, the court concluded that Ohio I s survival statute limited the damages recoverable in the Plaintiffs, § 1983 action. Specifically, the court ruled that the jury could only award damages for the conscious pain and suffering experienced by Scott Tinch immediately before his death, and for "the loss sustained by Scott Tinch because of not being able to enjoy the pleasures of his life." (Jury Instructions for second Phase of Deliberations at No. 1001-a). As the following discussion demonstrates, this ruling, and the accompanying jury instructions were erroneous.

The court's error in this regard is directly attributable to a confusion over two discreet issues: the application of statute law to the abatement of § 1983 actions, and the application of state law to the damages awardable under § 1983. The court incorrectly assumed that because state survival statutes could determine the abatement of § 1983 claims, such statutes could also serve to limit damages awardable in a § 1983 suit in federal court.

The aim of compensatory damages in a § 1983 case is to put the plaintiff in the same position he would have been in if the constitutional tort had not occurred. *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991). The starting point for analyzing damages for violations of constitutional rights is common law. *Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986). It is clear, however, that the issue of damages is controlled by federal, not state law. *Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986).

The source of the trial court's confusion over the appropriate amount of damages is ***Jaco V. Bloechle***, 739 F.2d 239 (6th Cir. 1984). In *Jaco* the court addressed the appropriate survival rule to be applied in an action under § 1983 brought on behalf of an individual who was shot and instantly killed by police officer s. The court noted that a claim under § 1983 is "personal to the injured

party," and is therefore an action which would have been subject to abatement at common law upon the death of the injured party. The court acknowledged that the Supreme Court had addressed "the very issue presented herein" in *Robertson v. Wegmann*, 436 U.S. 584 (1978).

In *Robertson*, the Supreme Court stated that § 1983 essentially recognizes that federal law may be deficient in providing a vehicle for enforcement of civil rights actions, and "[w]hen federal law is thus 'deficient', §1988 instructs us to turn to 'the common law, as modified and changed by the constitution and statutes of the (forum State),' as long as these are 'not inconsistent with the constitution and laws of the United States'." Id. at 587. The court noted that "one specific area not covered by federal law is that relating to the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant. Id.

The Jaco court looked therefore to Ohio law in determining the survival of the decedent's civil rights claim, but noted that Ohio law could not be applied if it was "inconsistent with the Constitution and laws of the United States." 739 F.2d at 241. In *Jaco*, the decedent had been killed instantly, and under Ohio decisional law, this fact foreclosed an action based on the survival statute. Although the court noted that a state survival

rule cannot be deemed inconsistent with federal law merely because it results in a loss of the action, the court held that in a broader sense Ohio's survival statute failed to provide for the survival of a § 1983 claim in a manner consistent with the policy underlying § 1983.

The court explained the rationale for its holding as follows:

> In the case at bar strict adherence to the relevant state law eviscerates the civil rights claim. Under Ohio's survival statute, this decedent's civil rights cause of action would have survived if his death had not been instantaneous; in light of the sweeping language of the enactment, to suggest that the Congress had intended that a civil rights infringement be cognizable only when the victim encounters pain and suffering before his demise, is absurd . . . . Ohio's survivorship law ja then hostile to "the Constitution and laws of the United States". To afford effect to the expressions and directions of the Supreme Court, in *Robertson v. Wegmann*, where, as here, the survival statutes of the forum state are hostile to promoting deterrence, protection and vindication against § 1983 civil rights infringements perpetrated under color of law the federal court must implement the congressional intent by allowing survival.

Id. at 244-45.

In applying *Jaco* to limit the damages in the case

at bar, the court ignored several crucial aspects of the Sixth Circuit's opinion. First, the court in *Jaco* dealt only with the use of state law to determine the survival of the action and the standing of the personal representative, not the available damages. In addition, and even more significant is the fact that the court held that "Ohio's survival statute is hostile to 'the Constitution and Laws of the United States'", and could therefore not be applied to the plaintiff's § 1983 action. Id. at 245.

The court's discussion of damages under Ohio's survival statue was relevant only to its explanation of why, under Ohio law, the decedent's claim would have abated. It is clear that the court in *Jaco* did not intend to restrict damages to those available under Ohio's survival statute. The court made this point obvious by stating that the Supreme Court had addressed "the very issue presented herein" in *Robertson v. Wegmann, supra*. *Robertson*, like *Jaco*, involved only the procedural aspects of applying state law to determine the survival of a § 1983 claim on behalf of a decedent, and did not address appropriate damages to be awarded.[7]

It should be further noted that the decedent in *Robertson* had died from causes unrelated to the alleged illegal act.

Having determined that the court's reliance on *Jaco* for the restrictive damages ruling was in error, it is appropriate to discuss the prevailing rule regarding damages in similar cases.

Research reveals no federal court decision where damages were held to be similarly limited by state law. The district court's limitation on damages in the case a bar is also in conflict with precedent from other circuits. *See Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489 (10th Cir. 1990). The *Berry* court held that federal courts must fashion a federal remedy to be applied to civil rights death cases. Significantly, the court cited *Jaco v. Bloech*, in reaching its decision. 900 F.2d at 1506-07.

The view of appropriate damages expressed by the Tenth Circuit in Berry finds support from other courts as well. *See Bell*, 746 F.2d at 1236; *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1086 (7th Cir. 1990). The federal district courts have followed these court of appeals rulings. *See Scothorn v. State*, 772 F. Supp. 556 (D. Kan. 1991); *Handley v. City of Seagoville, Texas*, 798 F. Supp. 1267 (N.D. Tex. 1992).

The Supreme Court in *Robertson v. Weamann* pointed out that the fundamental policy behind § 1983 lies not only in the compensation of the victim, but also

in the deterrence of unconstitutional acts committed under state law. 436 U.S. at 590-91. In *Bell v. City of Milwaukee*, the Seventh Circuit expressed its concern to effectuate this policy in a case such as the present where the killing is the unconstitutional act. 746 F.2d at 1239. The court reasoned that:

> [I)f Section 1983 did not allow recovery for loss of life notwithstanding inhospitable state law, deterrence would be further subverted since it would be more advantageous to the unlawful actor to kill rather than injure..... Therefore it is appropriate, as the Supreme Court has noted in regard to Section 1983 damage issue, to fashion a federal rule responsive to the need whenever a federal right is impaired.

Id.; see, also Tracy v. Bittles, 820 F.Supp. 396 (N.D. Ind. 1993) (citing *Jaco v. Bloechle* for the proposition that when the forum law is hostile to the promotion of deterrence, the court must nonetheless implement congressional intent.)

That the appropriate level of damages is not determined by the state restrictions applied in the case at bar is further supported by precedent from the Sixth circuit. *See, Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986); *Stenael v. Belcher,* 5523 F.2d 438, 444 (6th Cir. 1975). As the foregoing discussion demonstrates, the

court erred in restricting the damages to those available under Ohio's survival statute. The Plaintiffs are therefore entitled to a new trial on the issue of damages.

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR BIFURCATION UPON THE ISSUE OF LIABILITY AND DAMAGES PRIOR TO TRIAL THEN COMMITTED FURTHER ERROR BY ALLOWING SAID BIFURCATION JUST BEFORE ARGUMENT TO THE JURY.

In the case at bar, even though the court inappropriately bifurcated the Defendants as parties, as previously discussed, upon appropriate motion by the Plaintiffs at the beginning of trial that the issues of liability and damages should be tried separately, the court overruled said motion. However, just prior to the actual argument of the case to the jury, the court ordered the issues bifurcated and allowed only consideration of liability by the jury as the first phase of deliberations. This occurred after all the evidence had been presented to the jury by all parties.

In this particular case, highly prejudicial evidence as discussed in Part V, *infra,* which was not relevant even as to damages was provided to the jury upon the pretense

of being related to damages during the liability portion of the case. It was inherently improper that the jury hear the inappropriate information concerning drug treatment, marital problems, use of drugs, prior assaultive behavior, psychological treatment and other matters that were highly prejudicial upon the issue of damages during the case in chief.

Had the court bifurcated the issues pursuant to Fed R. Civ. P. 42, then the matters before the trial court would have been limited to the issues of liability and the appropriately low award of damages and/or the failure to award damages would have likely been avoided. Many of the matters that were brought before the jury were not proper in a case involving damages or liability. Nevertheless, had the court granted said motion for bifurcation, there would not have been the prejudicial effect upon the Plaintiffs. The same considerations for proper bifurcation as discussed in Part I, *supra*, is restated herein.

V. THE COURT RENDERED NUMEROUS EVIDENTIARY RULINGS WHICH WERE IRREGULAR AND PREJUDICIAL.

A. The Court Erred in Ruling That the Plaintiffs Were Not Entitled to an Inference Against the Defendants as a Result of the Defendants, Destruction of Use of Force Reports.

In the instant case, use-of-force reports concerning Defendants Neville and Sipes were destroyed during the pendency of the present litigation. Although stating that it was troubled to learn of the destruction of the documents, the district court was unable to find an appropriate resolution of the issue, stating that it could not conceive of a way to "level the playing field" (R. 155 Transcript of Proceedings, dated mar. 22, 1993 at p. 23). Plaintiffs contend that the reports were intentionally destroyed by the Defendants, and that it was error for the court to refuse to support an inference against the Defendants. Ultimately the court expressed its desire as follows: "I guess what I am looking for, for the future, is to make certain that this doesn't happen again." (Id. at 20). However, by bifurcating the trial and effectively dismissing the city as a party, the court foreclosed the possibility of making certain that "this doesn't happen

again". Since the city was not a party to the trial, the policy of improper destruction could not be enjoined or declaredunconstitutional.

In fact, the judge implicitly realized this defect when he later commented that he might have to reassess his decision to bifurcate (Id. at 30). Furthermore, the judge noted that he did not have jurisdiction to direct the police department to change its records destruction policy. He stated:

> I don't know whether this policy is legal or not . . . .And it seems to me that I have limited jurisdiction over policies of the police department. I believe I have jurisdiction to order what Mr. Freund said he on his own would suggest since I'm going to be dealing with this type of case. I don't have jurisdiction, absent a proper lawsuit, to direct the police department to change its retention and destruction policy, I just don't[.]

(R. 156 Transcript of Proceedings, dated March 23, 1993 at p. 13).

A city policy of destroying use-of-force reports is a relevant issue in determining whether a city has demonstrated' a reckless indifference to a citizen's constitutional rights. *See, City of Canton v. Harris,* 109 S.Ct. 1197 (1989). Since such documents are discoverable and the Defendants destroyed them, the

Plaintiffs were entitled to have the court instruct the jury to draw an adverse inference against the Defendants. The failure of the court to do so amounted to prejudicial error.

It is clear that such internal affairs documents are discoverable in excessive force cases. *See e.g.*, *Spell v. McDaniel*, 591 F. Supp. 1090, 1115 (E.D.N.C. 1984), *aff'd* 824 F.2d 1380 (4th Cir. 1987); *see, also, Montalvo v. Hutchinson,* 837 F. Supp. 576 (S.D.N.Y. 1993).

When a party intentionally withholds discoverable documents, the party seeking discovery is entitled to an inference that the documents contained damaging information; in the present matter the inference should be that the Defendants officers had used excessive force often in the past. *Schmind v. Milwaukee Elec. Tool Corp.* 13 F.3d 76 (3rd Cir. 1994); *Brown and Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119 (7th Cir. 1987); *State v. Liberatore,* 69 Ohio St. 2d, 493 N.E. 2d 561 (1982). The jury should have been so instructed as requested by the Plaintiffs.

B. The Court's Admission of Evidence Relating To the Plaintiff's Employment, Marital, or Drug History Before the Jury Determined Liability Amounted to Prejudicial Error.

This evidence can only be arguably relevant to the issue of damages, and is irrelevant to whether the individual defendants are liable. Therefore, to have admitted such evidence before the jury determined liability The trial court inappropriately allowed the introduction of evidence concerning the aforesaid matters in the trial on the alleged basis that it related to damages.

Notwithstanding it prejudiced the liability only phase, it was error for any purpose. These erroneous evidentiary instructions undoubtedly served as a basis to the jury in awarding inappropriate damages, as well as leading to the inconsistent verdict concerning liability on all the parties and upon all the necessary causes of action. *See, Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978); *Hytha v. Schwendeman,* 40 Ohio App. 2d 478 (1974); *Mastran v. Urichich*, 37 Ohio St. 3d 44 (1988) ; *Holman v. Grandview Hospital,* 37 Ohio App. 151, 157 (1987) ; and *Weis v. Weis,* 147 Ohio St. 416 (1947); Federal Rules of Evidence, rules 403, 501, 803, 802 803(6), 805, 901.

It was error for the trial court to allow the introduction of any testimony concerning the life expectancy of Scott Tinch or the diminishment of the life expectancy of Scott Tinch due to any alleged alcohol, drug abuse, or anything else other than the life tables

properly represented before the court. *See, e.g.,* *Pierce v. Tennessee Coal L. & R. Co.*, 173 U.S. 1 (1988); *Brandt v Mansfield Rapid Transit*, 153 Ohio St. 429 (1950); Ohio Revised Code Section 3919.05; *Federal Rules of Evidence*, rules 101, 104, 105, 201, 401-406, 701; *Bach v. Penn Central Transit*, 502 F.2d 117 (6th Cir. 1974); *Bolan v. Adams*, 19 Ohio App. 3d 206 (1984); *Sherlock v. Klempay Bothers*, 167 Ohio App. 3d 324 (Hamilton Cty. 1984); *Cooper v. Sisters of Charity of Cincinnati. Inc.*, 27 Ohio St. 2d 242 (1971).

C. The Trial Court Inappropriately Allowed Questioning of Officer Barbara Long Concerning A Polygraph She Had Taken Concerning Totally Unrelated Matters.

While the trial court eventually struck the testimony concerning a polygraph taken by officer Barbara Long in an unrelated matter, it was very damaging to the Plaintiffs, case for the jury to hear same. Further, the court readily admonished counsel for not having the general rule of law concerning polygraph examinations before the could which had a chilling effect upon the presentation of the case by counsel. In fact, counsel for the Plaintiffs set forth the appropriate rule of law, albeit without citation, and made it clear to the court

that absent a stipulation as to the polygraph's result, the polygraph would be inadmissible. Further, counsel for the Plaintiffs made it very clear that the polygraph would not be admissible without appropriate foundation. (*Mers v. Dispatch Printing Co.*, 39 Ohio App. 3d 99 (1988); *Zanesville v. Sheets*, 38 Ohio App. 3d 24 (1987); *Hawkins v. Marian Corr. Institute*, 62 Ohio App. 3d (1990).) As far as the Sixth Circuit authority which basically provides that generally in the absence of an agreement and/or stipulation between the parties to the contrary, results of polygraph examinations are inadmissible, see the cases of *Wolfel v. Holbrook*, 823 F.2d 970 (6th Cir. 1987); *Barnier v. Szentmiklosk*, 810 F.2d 594 (6th Cir. 1987).

D. It Was Error For The Trial Court To Refuse To Admit The Testimony of Defendants' Expert Witness, David Grossi, Upon Rebuttal.

Upon the presentation of the defense case, the Defendants refused to introduce the deposition of their police expert, David Grossi, which had been taken by video deposition pursuant to the Federal Rules of Civil Procedure. Upon Plaintiffs, attempt to introduce the taped testimony of Grossi as part of their rebuttal case, the trial court refused to receive the testimony. (T. Vol. 13, pp. 66-77) . Even

though the tape, (Plaintiffs' Exhibit 126) contained extremely relevant testimony to rebut the Defendants, case upon many issues, the trial court refused it as not being rebuttal testimony. Such refusal was erroneous and prejudicial and kept from the jury all the evidence available concerning the Defendants, reckless and wanton misconduct. The decision was prejudicial error.

VI. THE COURT COMMITTED NUMEROUS REVERSIBLE ERRORS IN INSTRUCTING THE JURY.

A. The Court Committed Reversible Error In Instructing The Jury That They Were Required To Find That The Defendants Actions Were The Proximate Cause Of Scott Tinch's Death.

1. The Initial Instructions Were Plain Error.

In the case at bar, the court instructed the jury that, in order to find the officers guilty of using excessive force for purposes of the Plaintiffs' Fourth Amendment claim, the jury was required to find that the officers acted "knowingly" (Jury Instructions for First Phase of Deliberations at Nos. 3002, 3003). The court further instructed that in addition to finding that the officers had

acted knowingly, the jury was required to find "that the violation of [decedent's] fourth amendment rights was a proximate cause of the damage." (Id. at No. 3005).[8]

It is clear that the instruction on proximate cause was improper in the instant case. *See,* *Ward v. City of San Jose*, 737 F. Supp. 1502, 1513 (N.D. Cal. 1990), *aff'd in pertinent part, modified on other grounds*, 967 F.2d 280 (9th Cir. 1992). once the jury found that the act of shooting Tinch was done knowingly, and the use of such force was unreasonable, a violation of Tinch'S Fourth Amendment rights was established.[9]

---

[8] The court defined proximate cause for this purpose as "a situation which in the natural and continuous sequence directly produces the harm, and without which it would not have occurred. Proximate cause occurs when the harm is the natural and foreseeable result of the violation of the fourth amendment. (Id.. at No. 3005). This instruction erroneously allowed the issues of comparative negligence, intervening conduct of the non-party City of Dayton, and other inappropriate issues to taint the jury's deliberations and final verdict.

[9] Unlike cause in fact, which concentrates on what happened in fact, proximate cause essentially involves a policy determination which concentrates on whether the defendant should be liable for the results of his or her conduct. S. Nahmod, Civil Rights and Civil Liberties Litigation §3.24 at 250 (2d ed. 1986).

Furthermore, even if some type of causation instruction was appropriate, which in this case it was not, the court clearly erred in using a standard of proximate cause derived from negligence where the conduct was intentional. *See,* S. Nahmod, Civil Rights and Civil Liberties Litigation § 3.24 at 252 (3d ed. 1992). Other courts which have directly addressed the issue of proximate cause in other types of cases brought under § 1983 have rejected the use of a "foreseeability" standard, in favor of a broader view of proximate cause. *See, e.g.,* *Johnson v. Greer*, 477 F.2d 101, 107 (5th Cir.1973); *Anderson v. Nosser,* 456 F.2d 835 (5th Cir.) (en banc), *cert. denied* 409 U.S. 848 (1972); *Ward v. City of San Jose*, supra, 737 F. Supp. at 1513-14, *aff'd in pertinent part, modified on other grounds,* 967 F.2d 287 (9th Cir. 1992).

Although there are two opinions from the Sixth Circuit discussing the issue of proximate cause in the context of a § 1983 action, these cases both involved situations where the plaintiffs had been injured by the intervening acts of private third parties. *See,* *Cameron v. City of Pontic*, 813 F.2d 782 (6th Cir. 1987); *Carlson v. Conklin,* 813 F.2d 769 (6th Cir. 1987). The presence of privately caused harm distinguishes these cases from the case at bar. *See S.* Nahmod, Civil Rights and Civil Liberties Litigation § 3.24 at 252 (2d ed. 1986) . The

non-party city was a moving force, along with the officers, in the case of death of Scott Tinch.

In the instant case, the jury found that the Defendants, conduct violated a constitutional right and caused Scott Tinch's injury. Injecting the issue of deliberations was inproximate cause into the jury's deliberations was in error, and clearly confused the jurors. This error led to the jury's finding of no liability on the part of Neville, and contributed to the jury's confusion regarding the state law claims, including the ultimate inconsistent verdict on the wrongful death and survival claims.

With respect to the Plaintiffs, wrongful death and survival claims, the court instructed that the jury was required to find "that the malicious, bad faith, wanton or reckless actions of Sipes and/or Neville were the proximate cause" of the damages Plaintiffs allege were suffered (Jury Instructions for First Phase of Deliberations at Nos. 4001, 5001). The court defined proximate cause, for this purpose as follows:

> A defendant's malicious, bad faith or wanton or reckless actions are a proximate cause . . . when they create a situation which in the natural and continuous sequence directly produces the harm, and without which it would not have

> occurred. Proximate cause occurs when the harm is the natural and foreseeable result of the actions.
>
> The test for foreseeability is not whether a party should have foreseen the damage precisely as it happened to the specific property or the specific person. The test is whether under all the circumstances a reasonably prudent person would have anticipated that damage and/or injury was likely to result to someone from the act or failure to act.

(Id. at Nos. 4003, 5003).

This definition of proximate cause is the same negligence standard erroneously given in connection with the claim under § 1983. In order to find liability on the wrongful death and survival claims, the jury was required to, and did find that the Defendants acted with malice, in bad faith, and/or in a wanton or reckless manner. Thus, the claim involved intentional, or at the very least, reckless conduct.

It is clear, therefore, that in giving an instruction on proximate cause derived from negligence, the court erred. This error resulted in confusion of the jurors and was responsible, in large part, for the inconsistent verdicts discussed infra.

2. The Jury Instruction Was Plain Error And Should Be Reversed Absent Plaintiffs, Initial Objections to the Instruction. The

Federal Rules of Civil Procedure, Rule 51 provides generally that a party must object to a proposed instruction in order to preserve the error on appeal. There is an exception to this rule, however. Although Rule 51 does place a duty on counsel to object, this does not always discharge the trial court's independent duty to correctly instruct the jury on the material issues of the case. A reviewing court may reverse a decision on the ground of plain error in a jury instruction, even if no objection was made, in order to prevent a miscarriage of justice. The majority of circuits, including the Sixth Circuit, have adopted the plain-error exception. *See, e.g., Broan Manufacturing Co. v. Associated Distributors,* 932 F. 2d 1146 (6th Cir. 1991); *Colburn v. Bunge Towing Inc.,* 883 F.2d 372 (5th Cir. 1989); *Beardshall v.Minuteman International Press, Inc.*, 654 F.2d 23 (3d Cir. 1981).

In the instant case, the instruction on proximate cause was plain error and sufficient grounds for reversal even absent an objection. One factor that courts have considered in the plain-error inquiry is whether the jury had been properly guided in its deliberations. *See,*

Colburn v. Bunge Towing, Inc., supra. Clearly the jury's inconsistent verdicts, discussed infra at Part VIII, demonstrate that the jury was mislead in its deliberations by the proximate-cause instruction.

B. The Court Erred In Giving An Instruction On Punitive Damages Which Set Out A Higher Standard Than That Required Under *Smith v. Wade*, and Which Resulted in Jury Confusion.

In *Smith v. Wade,* 461 U.S. 30 (1983), the Supreme Court held that punitive damages may be awarded against an individual where the plaintiff is able to show recklessness or callous indifference to a plaintiff's federally protected rights. The court expressly rejected the argument that malice or evil motive must be proved before punitive damages may be awarded.

In the wake of *Smith v. Wade* whenever a plaintiff makes out a prima facie case of a constitutional violation which requires at least a showing of callous indifference or reckless disregard, the plaintiff may be entitled to a jury instruction on punitive damages. *See, e.g., Walsh v. Mellas,* 837 F.2d 789 (7th Cir. 1988), *cert. denied,* 108 S.Ct. 2832 (1988); *Rakovich v. Wade,* 819 F.2d 1393 (7th Cir. 1987), *rev'd on other grounds,* 850 F.2d 1180

(7th Cir. 1988).

The Sixth Circuit Court of Appeals has stated that "punitive damages may be awarded under § 1983 even where they would not normally be recoverable under the local law in the state where the violation occurred." *Gordon v. Norman,* 788 F.2d 1194, 1199 (6th Cir. 1986). Thus, it is clear that federal standards govern the award of punitive damages under § 1983. *Savarese v. Agriss*, 883 F.2d 1194 (3d Cir. 1989).

In the instant case, the standard of *Smith v. Wade, supra* is buried among an explanation of other higher standards for such awards which are no longer applicable in light of *Smith v. Wade.* The instruction states that the jury must find that the officers,' "actions were maliciously, or wantonly, or oppressively done". (Jury Instructions for the Second Phase of Deliberations No. 1003-a). Although technically the standards were presented in the disjunctive, the instruction was clearly misleading in light of its obvious emphasis on the malicious and oppressive aspects of the instruction, to the exclusion of the reckless or callous disregard standard.

As a result of the improper instruction and the accompanying confusion of the jury, the Plaintiffs are entitled to a new trial on this issue.

C. The Court Inappropriately Instructed Upon The Issue Of Hedonic Damages In Both The §1983 Action And In The Wrongful Death Action Under The Applicable Law.

Hedonic damages, also known as damages awarded for loss of enjoyment of life, are a relatively new creature existing as a separate and distinct part of damages compensable in a tort action. Hedonic damages were first recognized as a separately compensable class of damages in *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St. 3d 610 (1992); *see also* *Ramos v. Kuzas*, 65 Ohio St. 3d 42 (1992). The Ohio Supreme Court's holding in *Fantozzi* made it clear that hedonic damages were available to plaintiffs in a much broader class of actions. The court in *Fantozzi* took note that hedonic damages were already provided for in § 23.01 of the 1992 version of the Ohio Jury Instructions. Indeed, the court went on in *Fantozzi* to draft its own model Ohio Jury Instruction regarding hedonic damages. (64 Ohio St. 3d at 618). The Ohio Supreme Court recognized that in awarding hedonic damages, a judge or jury would be compensating a plaintiff for the most personal of losses: that of the inability to ever again participate in those activities which gave the injured person specific pleasure of happiness in their lifetime. Id. at 617. The

underlying tenet of the *Fantozzi* decision is clearly that all the injured party should have compensation for all the injuries sustained. The applicability of such damages is clear in the case at bar for § 1983 actions, the wrongful death, and the survivorship.

Much of the issue on hedonic damages has already been addressed in the previous Part III of this brief. There was clearly an incomplete instruction on said damages which denied the Plaintiffs the right to full recovery.

D. The Court Erred When It Failed To Give Plaintiffs' Instruction on Self-Defense.

The very gravamen of Plaintiffs' case was that the deceased had a right to exercise self-defense of his brother and himself when confronted with unknown persons who had drawn their weapons in an apparent attempt to use deadly force against the brother of the deceased and the deceased, himself. The officers' very placement of themselves in the situation which the deceased confronted gave him the right to use force.

The law in this issue was submitted to the trial court in memorandum and requested jury instructions on

April 6, 1993. The court refused to instruct the jury that the deceased had a right to use self-defense. The law providing for said instruction is clear:

> If a person in good faith and upon reasonable ground believes that a family member is in imminent danger of death or serious bodily harm, such person may use reasonably necessary force to defend the family member to the same extent as the person would be entitled to use force in self defense. *Sharp v. State* (1850), 19 Ohio 379; and *State v. Sheets* (1926), 115 Ohio St. 308, approved and followed.

State v. Willford, 49 Ohio St. 3d 247 (1990).

All of the elements of self-defense were present in the case at bar pursuant to law. Here, the deceased did not know the two unidentified assailants of his brother we re police officers. They did not, nor did they ever, make an arrest of either Shaun Tinch or the deceased, Scott Tinch. The officers had no right to pull their guns and put themselves and the Tinch brothers in the position in which they found themselves.

Indeed, federal case authority has founded liability on the officers, even in uniform, where they act so

recklessly in failing to identify themselves that they create a situation where an unsuspecting citizen uses deadly force. *See* *Murphy v. City of Long Beach,* 696 F. Supp. 500 (1987); *Yates v. Cleveland,* 941 F.2d 444 (6th Cir. 1991). In *Yates,* a case almost factually similar to the one at bar, the Court held that a police officer's subjective belief that his life was in danger was irrelevant when he used excessive force upon a victim who had rushed at him in a dark hallway of private residence at 2:45 a.m. when the officer did not identify himself as a police officer, did not wear a hat, and did not shine a flashlight. In this case, it was not objectively reasonable for the officers to believe that the deceased knew they were police officers or that he could realize they were not about to execute his brother. The court erred when it failed to charge the jury with the deceased's rights under these circumstances.

VII. THE COURT ERRED IN HOLDING THAT THE DEFENDANTS WERE ENTITLED TO IMMUNITY FROM THE PLAINTIFFS' STATE WRONGFUL DEATH AND SURVIVAL ACTIONS.

Pursuant to Rule 8(C) of the Federal Rules of Civil Procedure, in order to be entitled to an affirmative defense a party must affirmatively plead the defense in

his answer. The rule provides in relevant part, that "in pleading to a preceding pleading, a party shall set forth affirmatively..... any other matter constituting an avoidance or affirmative defense. (Emphasis added).

Although sovereign immunity is not among the affirmative defenses specifically listed in the rule, sovereign immunity is a defense that must be affirmatively raised in an answer. In *Mitchel v. Borton,* 70 Ohio App. 3d 141, 590 N.E. 2d 832 (1990), the court interpreted an Ohio rule identical to federal rule to include sovereign immunity as an affirmative defense. Furthermore, the Sixth Circuit in *Kennedy v. City of Cleveland,* 797 F.2d 297 (6th Cir. (1986), held that the defense of immunity must be affirmatively plead or it will be waived.

Looking to the Defendants, answer, it is clear that the defense of sovereign immunity was not affirmatively plead. Although the Defendants collectively assert that they are "absolutely or qualifiedly immune from suit," this defense is obviously raised in connection with the action under § 1983. The Defendants do not raise the defense of sovereign immunity. Therefore, the Defendants waived the defense of sovereign immunity.

Distinct from the question of waiver of the

defense of immunity is the issue of whether a governmental employee is entitled to the protection of sovereign immunity. R.C. 2744.03(A)(6) specifically provides:

> (a) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:
>
> (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

R.C. 2744.03(A)(6) (emphasis added).

This section clearly exempts malicious or reckless employee behavior from sovereign immunity protection. In the instant case, the jury specifically found that the actions of both of the officers were wanton and malicious. Therefore, the individual officers cannot avoid liability for the Plaintiffs, wrongful death and survival actions pursuant to sovereign immunity. It would be error for the court to apply sovereign immunity to the officers, actions. Another basis for liability on the city's behalf is the doctrine of *respondeat superior.* The Ohio Supreme Court held that in most cases, it is a question of a material fact as to whether a police officer was acting in the scope of his employment that precludes granting

summary judgment to the city. *Osborne v. Lyles*, 63 Ohio St. 3d 326, 587 N.E. 2d 825 (1992). The *Osborne* court held that even though an employee's act is willful or malicious, it may still be within the scope of employment. 587 N.E. 2d 829. Therefore, the acts of the officers in the instant case, even though they were willful and malicious, were undertaken within the scope of their employment so that the city is liable under the theory of *respondeat: superior.* This is especially true where the city's lack of policy, procedures, rules, etc. place the officers in the position where they must unlawfully, recklessly and wantonly take a life.

VIII. IT WAS INAPPROPRIATE FOR THE TRIAL COURT TO DISMISS THE CITY UPON THE ISSUE OF WRONGFUL DEATH PURSUANT TO SECTION 2744.01 PRIOR TO TRIAL.

It was error for the trial court to dismiss the city on the causes of action for wrongful death and survivorship, as well as the § 1983 action as discussed heretofore. Plaintiffs still maintain that said dismissal was unconstitutional, not only under the U.S. Constitution but the state constitution. The grant of immunity by the statute to municipalities represents a denial of due process rights under Article I, Par. 16 and Article I, Par. 19(A) of

the Constitution of Ohio in regards to the prosecution of wrongful death claims. *See,* *Longfellow v. City of Newark*, 18 Ohio St. 3d 144 (1985).

The provisions of the immunity statutes also provide that there should be no immunity provided where there has been a cause of action recognized elsewhere under the statutes and law of Ohio. Pursuant to R.C. 2307.60, the defendant city would be liable for compensatory damages, punitive damages, costs, and reasonable attorneys fees for an y act which amounted to a crime. It is not necessary that there be any prosecution for said crime, but simply that the crime would have been committed by the acts of the defendant. In the case at bar, the Defendant officers and the city were guilty of interference with the civil rights of the deceased pursuant to R.C. 2929.45, along with other statutory crimes. Indeed, even though not particularly germane to the causes of action herein, it is clear that a municipality may be liable under the Civil Rights statute, R.C. 4112.99, for violation of civil rights arising out of certain circumstances. It would be inherently discriminatory for any municipality to be liable under that statute but not liable for the violation of civil rights of an individual, such as Scott Tinch and his family, under 42 U.S.C. § 1983 for wrongful death. Such unequal protection and denial of due process cannot be tolerated.

It goes without saying that immunity under the statute doesn't apply to claims of federal civil rights violation. *Jones v. Dayton Bd. of Ed.*, No. 11933 (Ohio Ct. App. 2d Dist. 1990). The city enjoys no immunity from a cause of action for wrongful death either under a civil rights claim or a state wrongful death claim. It was error to rule otherwide prior to trial.

IX. THE JURY'S WRONGFUL DEATH AND SURVIVAL VERDICTS ARE INCONSISTENT WITH THE VERDICT OF LIABILITY UNDER § 1983 FOR A VIOLATION OF SCOTT TINCH'S FOURTH AMENDMENT RIGHTS.

The jury found that Defendant Sipes knowingly violated Scott Tinch'S Fourth Amendment rights,[10] and that this violation was a proximate cause of Scott Tinch's death (See R. 133 Interrogatories Executed by Jury, Nos. 1-3) . In connection with the wrongful death and survival claims,

[10] The court did not submit to the jury any issue related to liability under fourteenth amendment substantive due process claim.

however, the jury found that the malicious, wanton, or reckless conduct of the defendants was not the proximate cause of Scott Tinch's injury. Those verdicts are inherently inconsistent and must be reversed. Where a verdict is inconsistent, indicating that the jury as confused, a new trial is appropriate. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Global Van Lines, Inc. v. Nebeker*, 541 F.2d 865 (10th Cir. 1976). If a jury gives inconsistent answers to special interrogatories, the case must be remanded for a new trial. *Willard v. The John Hayward*, 577 F.2d 1009 (5th Cir. 1978).

Furthermore, where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or that it abused its power, granting of a motion to alter or amend judgment, for new trial, or for relief from judgment, if timely made, is not discretionary.[11] *Hopkins v. Coen*, 431 F.2d 1005 (6th Cir. 1970) ; *Devine v. Patterson*, 242 F.2d 838 (6th Cir. 1957).

---

[11] In the instant case, the plaintiff made such a timely motion (R. 152 Motion by Plaintiff for Judgment Not Withstanding The Verdict, for Reconsideration, for New Trial and to Alter or Amend Judgment, May 27, 1993); the motion was denied by the trial court on March 17, 19954 (R. 186 Order Denying Motion for Judgment Notwithstanding the Verdict, etc., March 17, 1994).

In *Ward v. City of San Jose,* the Ninth Circuit Court of Appeals faced an inconsistent verdict analytically identical to the verdict involved in the case at bar. In that case, the plaintiff's decedent was shot and killed by a police officer participating in a raid on a neighbor's house. The jury found that the defendant officer's use of force violated the decedent's constitutional rights.[12]

Although the district court in *Ward* properly did not require a finding of proximate cause for the § 1983 claim, the verdict form required the jury to find proximate cause before it could impose wrongful death liability, since such liability could be established by mere negligence.

Although the jury found the defendant liable under § 1983 for violating the decedent's fourth amendment rights, the jury found, in connection with the state wrongful death claim, that the officers, negligence was not a proximate cause of the decedent's death. 967 F.2d at 286.

The court of appeals held that the inconsistency

[12] Although it was unclear in *Ward* whether the jury based its finding of a constitutional violation on the fourth or fourteenth amendments, the court of appeals assumed, for the purposes of its analysis of the verdicts' consistency, that the finding of liability under § 1983 was based the fourth amendment. *Ward v. City of San Jose, supra.*

between these two verdicts required remand of the state wrongful death claim. Id. at 286-87; *see also Hartzler v. Licking County Humane Society,* 740 F. Supp. 470 (S.D. Ohio 1990).

As in *Ward* the jury in the instant case found that defendant Sipes had violated the decedent's fourth amendment rights by using unreasonable force. The jury further found that both Sipes and Neville acted with a degree of culpability sufficient to impose liability under the wrongful death statute. The jury's verdict that the same use of force was not the proximate cause of Scott Tinch's death for purposes of the state wrongful death claim is therefore clearly inconsistent with the verdict of liability on the § 1983 claim. Thus, as authority cited above demonstrates, a new trial is required on the state wrongful death and survival claims. The court should remand these claims for a trial on damages with the issue of liability being directed in favor of the Plaintiffs as a matter of law.

X. THE COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR RECONSIDERATION, FOR NEW TRIAL, AND/OR TO ALTER OR AMEND JUDGMENT.

Immediately upon the jury's return of the verdict, the Plaintiffs made the appropriate aforesaid motions, which the court denied. Thereafter, the same motions were made and supported by a seventy page written memorandum on May 24, 1993. The trial court overruled all such motions. It was error for the trial court to fail to provide the remedies requested by the Plaintiffs, then and there and avoid the costly appeal process and to do justice to the Plaintiffs.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the appellate court sustain the judgment for Plaintiffs against Defendant Sipes upon the § 1983 claim. Further, the court is requested to remand the case with appropriate instructions to set aside the jury's inconsistent verdict in favor of the Defendants on the Plaintiffs, wrongful death and survival claims under Ohio law and to enter judgment in favor of the Plaintiffs on those claims, or in the alternative, to order a new trial on the Plaintiffs, wrongful death claims; to order a new trial on damages for all causes of action (including the excessive force claims under 42 U.S.C. § 1983), to order a new trial against the City of Dayton; and to affirm the judgment against Defendant Sipes on the Plaintiffs, excessive force claim under 42 U.S.C. § 1983.

Respectfully submitted,
DWIGHT D. BRANNON & ASSOCIATES

Dwight D. Brannon
Ohio Registration No. 0021657
320 Regency Ridge Drive
Dayton, OH 45402
(513) 291-3400

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been served upon Neil F. Freund, Attorney for Appellees, 1800 Dayton Arcade Centre, Dayton, OH 45402 by mailing a copy of same regular U.S. Mail this 30th day of August, 1994.

Dwight Brannon

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
REPLY BRIEF OF THE APPELLANT

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Docket No. 94-3436/3516

TONYA M. TINCH, Administratrix of the Estate of Scott E. Tinch; Individually as the surviving spouse of Scott E. Tinch; As parent, guardian, and next friend of Amanda M. and Justin S. Tinch, Minors.

Plaintiff-Appellant
Cross Appellee

vs.

CITY OF DAYTON; Michael J. Sipes;
Russell E. Neville;
James E. Newby

Defendants-Appellees
Cross Appellants

On Appeal from the United States District Court
For the Southern District of Ohio
Western Division

Reply Brief for the Appellant/Cross Appellee

Dwight D. Brannon
DWIGHT D. BRANNON & ASSOCIATES
320 Regency Ridge Dr.
Dayton, Ohio 45459
(513) 291-3400

Attorney for Plaintiff-Appellant/Cross Appellee

TABLE OF CONTENTS

Page

TABLE OF CITATIONS 206

ARGUMENT:

I. RESPONSE TO CROSS APPEAL

A. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT HEDONIC DAMAGES ARE RECOVERABLE UNDER 42 U.S.C. § 1981 211

B. INSTRUCTIONS FOR BOTH PAIN AND SUFFERING HEDONIC DAMAGES WERE APPROPRIATE 214

C. AN AWARD OF DAMAGES FOR LOSS OF ENJOYMENT OF LIFE IN THIS CASE IS APPROPRIATE 215

D. THE AWARD OF HEDONIC DAMAGES WAS SUPPORTED BY THE EVIDENCE 217

E. ANY ADMISSION OF EVIDENCE RELATING TO CUSTOM AND POLICY WAS CLEARLY HARMLESS TO THE INDIVIDUAL DEFENDANTS 218

II. REPLY TO APPELLEES' BRIEF

A. THE DISTRICT COURT INCORRECTLY RULED THAT SEPARATE CONSTITUTIONAL TORT DOES NOT EXIST AGAINST THE CITY OF DAYTON UNDER 42 U.S.C. § 1983 220

1. The District court abused its discretion by bifurcating the trials of the officers and the City 222

2. The bifurcation of the trial and shielding of the City of Dayton undermined the policy behind § 1983 224

3. The bifurcation effectively removed the City gf Dayton as a party to action 226

B. A CAUSE OF ACTION ON BEHALF OF TONYA TINCH AND HER CHILDREN UNDER § 1983 DOES EXIST FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAL RELATIONSHIP 227

C. THE DISTRICT COURT DID ERR IN LIMITING THE JURY'S COMPENSATORY DAMAGES AWARD TO HEDONIC DAMAGES 228

D. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR BIFURCATION OF THE ISSUES OF LIABILITY AND DAMAGES, AND COMMITTED FURTHER ERROR BY ALLOWING SAID BIFURCATION JUST BEFORE FINAL ARGUMENT TO THE JURY 231

E. THE DISTRICT COURT ERRED IN RULING THAT THE PLAINTIFFS WERE NOT ENTITLED TO AN INFERENCE AGAINST THE DEFENDANTS AS A RESULT OF THE DEFENDANTS' DESTRUCTION OF USE-OF-FORCE DOCUMENTS . . . 232

F. THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE RELATING TO SCOTT TINCH'S EMPLOYMENT, MARITAL, OR DRUG HISTORY BEFORE THE JURY DETERMINED LIABILITY 233

G. THE QUESTIONING OF OFFICER BARBARA LONG WAS INAPPROPRIATE AND PREJUDICIAL TO THE PLAINTIFFS 233

H. THE TESTIMONY OF DEFENDANTS' EXPERT WITNESS SHOULD HAVE BEEN ADMITTED ON REBUTTAL 234

I. THE DISTRICT COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO PROXIMATE

CAUSE 234

J. THE DISTRICT COURT'S INSTRUCTION ON PUNITIVE DAMAGES WAS INCORRECT AND RESULTED IN JURY CONFUSION 235

K. THE DISTRICT COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO APPELLEE OFFICER'S DEFENSE OF SELF-DEFENSE OR THE RIGHT TO SELF-DEFENSE 236

L. THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANTS IMMUNITY FROM THE PLAINTIFF'S OHIO LAW WRONGFUL DEATH AND SURVIVAL ACTIONS 237

M. THE DISTRICT COURT SHOULD NOT HAVE DISMISSED THE CITY OF DAYTON UPON THE ISSUE OF WRONGFUL DEATH PURSUANT TO OHIO REV. CODE ANN, § 2744.01 237

N. THE JURY'S VERDICT IN THIS CASE IS INCONSISTENT 238

CONCLUSION 239

CERTIFICATE OF SERVICE 240

TABLE OF CITATIONS

Cases **Page**

Atlantic & Golf Stevedors, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) 238

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 213
. 230

Berry v. City of Muskogee, Oklahoma, 900 F.2d 1489 (10th Cir. 1990) 230

Brewer v. Chauvin, 938 F.2d 860 (8th Cir. 1991) 216

Fantozzi v. Sandusky Cement Products Co., 64 Ohio St.3d 601, 597 N.E.2d 474 (1992) 214
. 217

Gordon v. Norman, 788 F.2d 1194 (6th Cir. 1986) 228
. 231

Graham v. Sauk Prairie Police Commission, 915 F.2d 1085 (7th Cir. 1990) 213
. 230

Greene v. City of New York, 675 F. Supp. 110 (S.D.N.Y. 1987) 227

Hawkins v. Campo, 781 S.W.2d 128 (Mo. Ct. App. 1989) 233

Hopkins v. Coen, 431 F.2d 1005 (6th Cir. 1970) 238

In re Bendedictin Litigation,
857 F.2d 290 (6th Cir. 1988) 222

Jaco v. Bloechle,
739 F.2d 239 (6th Cir. 1984) 211
. 212
. 229

Kennedy v. City of Cleveland,
797 F.2d 297 (6th Cir. 1986) 237

Keyes Fibre Co. v. Packaging Corp. of America,
763 F. Supp. 374 (N.D. Ill. 1991) 222

Los Angeles v. Heller,
475 U.S. 796 (1986) 221

MacDougald v. Garber,
73 N.Y.2d 246, 536 N.E.2d 372 (1989) 216

Marryshow v. Town of Bladesnburg,
139 F.R.D. 318 (D. Md. 1991) 223

Matter of Estate of Casey,
155 Ill. App. 3d 116, 107 Ill. Dec. 809,
507 N.E.2d 962, (4th Dist. 1987) 235

Meyers v. City of Cincinnati,
14 F.3d 1115 (6th Cir. 1994) 218

Murphy v. Owens-Illinois, Inc.,
779 F.2d 340 (6th Cir. 1985) 234

Pension Benefit Guaranty v. East Dayton Tool & Die,
14 F.3d 1122 (6th Cir. 1994) 225

Purnell v. City of Akron,
925 F.2d 941 (6th Cir. 1991) 227
. 228

Ramos v. Kuzas,
65 Ohio St. 3d 42,
600 N.E.2d 241 (1992) 214
. 216
. 217

Reeve v. Aleutian Airways, Inc. v. Rice,
789 F. Supp. 417 (D.D.C. 1992) 225

Robertson v. Wegmann,
436 U.S. 584 (1978) 222
. 228

Roman v. City of Richmond,
570 F. Supp. 1544 (N.D. Cal. 1983) 219
. 223

Schmind v. Milwaukee Elec. Tool Corp.,
13 F.3d 76 (3d Cir. 1994) 232

Scothorn v. State,
772 F. Supp. 556 (D. Kan. 1991) 230

Singleton v. Suhr,
No. 55367 (Ohio Ct. App. 8th Dist.
Cuyahoga County May 18, 1989) 229

Smith v. City of Fontana,
818 F.2d 1411 (9th Cir. 1987) 227

Smith v. Wade,
461 U.S. 30 (1983) 235

State v. Carr, No. C810517
(Ohio Ct. App. lst Dist.
Hamilton City June 2, 1982) 236

Stengel v. Belcher,
522 F.2d 438 (6th Cir. 1975) 231

Sullivan v. Little Huntinh Park Inc.,
396 U.S. 229 (1969) 212

Tracy v. Bittles,
820 F. Supp. 396 (N.D. Ind. 1993) 229

United States Gypsum v. Schiavo Brothers, Inc.,
668 F.2d 172 (3d Cir. 1981),
cert, denied, 465 U.S. 961 (1982) 223

Ward v. City of San Jose,
737 F. Supp. 1502 (N.D. Cal. 1990),
aff'd in pertinent part, modified on other grounds,
967 F.2d 280 (9th Cir. 1992) 235

Weeks v. Chaboudy,
984 F.2d 185 (6th Cir. 1993) 213
. 230

Yates v. Cleveland,
941 F.2d 444 (6th Cir. 1991) 236

Statutes

Fed. R. Civ. P. 8 225

Fed. R. Civ. P. 19 226

Fed. R. Civ. P. 54 225

Ohio Rev. Code Ann, § 2744.01 237

42 U.S.C. § 1983. 211,212,213,215,220,221,222,
. 224,225,227,229,230,237,239

Others

S. Nahmod, Civil Riahts and Civil Liberties Litigation:
The Law of Section 1983,
§ 4.03 (3d ed. 1991) 212

ARGUMENT

I. RESPONSE TO CROSS APPEAL

A. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT HEDONIC DAMAGES ARE RECOVERABLE UNDER 42 U.S.C. § 1983.

The Defendants-Cross Appellants continue to be confused with regard to the effect of state law in determining the damages available under § 1983. Contrary to their unsupported assertions, federal courts are not to look to state law as controlling on the issue of available damages.

The Defendants-Cross Appellants have provided no support for the proposition that hedonic damages are not recoverable under 42 U.S.C. § 1983. Both the district court in its decision, and the Defendants-Cross Appellants in their brief, incorrectly rely on Jaco v. Bloechle, 739 F.2d 239 (6th Cir. 1984), for the proposition that Ohio's survival statute controlled the measure of damages in this case (Brief of Appellees-Defendants-Cross Appellants City of Dayton, Michael J. Sipes, Russell E. Neville, and James E. Newby [Appellees' Brief herein] at 6). The court in Jaco v. Bloechle, supra, dealt only with the use of state law to determine the survival of the action and the standing of the personal representative, and found that the Ohio survival

statute, which would not allow the survival of a § 1983 action, was hostile to the Constitution and laws of the United States, and therefore could not be applied. 739 F.2d at 244-45. Any argument that Jaco precludes the recovery of hedonic damages in §1983 actions is unsupported by that decision. In fact, Jaco is properly viewed as a rejection of the argument that Ohio's survival statute can control either the survival or the available damages in a § 1983 case.

Other than the mischaracterization of Jaco v. Bloechle, supra, the Defendants-Cross Appellants offer no support for the proposition that hedonic damages are not recoverable under §1983. This is not surprising considering the apparently universal acceptance of the principle "that neither the forum state's common law nor general common law is determinative for damage purposes." S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, § 4.03 at 275 (3d ed. 1991).

The measure of damages available under § 1983 is controlled by federal law, not state law, and the Supreme Court made this clear many years ago. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (stating that "compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988", and both federal and state rules on damages may be utilized, whichever better serves the

policies expressed in the federal statutes). It is clear that the weight of authority points to the fact that a court has the leeway to structure an appropriate federal remedy whenever a federal right is impaired. Bell v. City of Milwaukee,, 746 F.2d 1205, 1239 (7th Cir. 1984) (holding that victim's estate could recover loss-of-life damages even though Wisconsin law did not permit a victim's estate to recover such damages); Graham v. Sauk Prairie Police Commission, 915 F.2d 1085 (7th Cir. 1990) (stating that availability of loss-of-life damages should not vary from state to state depending on state indemnification rules).

The Defendants-Cross Appellants, argument that state law should limit available damages is also foreclosed by precedent from this Court. In Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993), this court held that federal, not Ohio, joint and several liability damages rules applied in § 1983 cases. Significantly, the court found that a "federal rule" regarding damages could be found not only in statutes or Supreme Court decisions, but also in the decisions of other federal courts. *Id.* at 189. Thus, Defendants-Cross Appellants, claim that federal precedent should be rejected in favor of Ohio law is clearly without merit.

B. INSTRUCTIONS FOR BOTH PAIN AND SUFFERING AND HEDONIC DAMAGES WERE APPROPRIATE.

Even if Ohio law is considered, the Defendants-Cross Appellants, arguments must fail. It is clear that under Ohio law hedonic damages may clearly be treated as a separate and distinct element of damage, apart from damages for pain and suffering. Fantozzi v. Sandusky Cement Products Co., 64 Ohio St. 3d 601, 597 N.E.2d 474 (1992). Damages from being unable to enjoy the pleasures of life have been characterized as the loss of a positive experience, while suffering such as pain, grief, shock, and so forth have been described as an infliction of a negative experience. 64 Ohio St. 3d at 617, 597 N.E.2d at 486.[1]

The distinction between these two types of damages was sufficiently explained to the jury in the instant case. The jury was instructed that:

---

[1]Cross Appellants, citation to Ramos v. Kuzas, 65 Ohio St. 3d 42, 600 N.E.2d 241 (1992), is inapposite in that the court based its decision, inter alia, on the fact that the child in that case did not have the ability to develop or perform pleasurable activities. It is beyond argument in the case at bar that Scott Tinch had the requisite ability to develop or perform pleasurable activities.

> Plaintiff may recover damages for conscious pain and suffering which Scott Tinch sustained before his death. Plaintiff may also recover damages for the period following his death to compensate his estate for the loss sustained by Scott Tinch because of not being able to enjoy the pleasures of his life.

(See Transcript vol. 15 at 117.) This instruction was clearly sufficient to guide the jury in determining the appropriate amount to be awarded to Tinch for pain and suffering before his death, and loss sustained by Tinch because he would not be able to ever again enjoy the pleasures of life.

The Defendants-Cross Appellants' argument that the award should be vacated in the instant case must be rejected for several reasons. First, the limitations peculiar to Ohio law upon which the Cross Appellants rely are simply not determinative in this action under § 1983. In addition, even under the Ohio courts, admonition against duplicative recoveries, the award in the instant case could be upheld.

C. AN AWARD OF DAMAGES FOR LOSS OF ENJOYMENT OF LIFE IN THIS CASE IS APPROPRIATE.

The aim of compensatory damages in a § 1983 action is to put the plaintiff in the same position he would have been in if the constitutional tort had not occurred.

Brewer v. Chauvin, 938 F.2d 860 (8th Cir. 1991). This is true whether the plaintiff is compensated for the positive experiences in life that were taken away from him or the negative experiences that were forced upon him. Contrary to Defendants-Cross Appellants' argument, hedonic damages are not dependent on the plaintiff's cognitive awareness of his loss of enjoyment of life.

The Defendants-Cross Appellants misstate the holding of MacDougald v. Garber, 73 N.Y.2d 246, 536 N.E.2d 372 (1989). That court held only that there must be "some level of awareness" in order for the plaintiff to recover, but flatly refused to adopt any more precise definition of that awareness. 73 N.Y.2d at 255, 536 N.E.2d at 375. The Defendants-Cross Appellants also confuse the holding in Ramos v. Kuzas, 65 Ohio St. 3d 42, 600 N.E.2d 241 (1992). Far from concluding that "any claim for loss of enjoyment of life should be limited to that period of conscious survival" (Appellees' Brief at 9), the court in Ramos found that a newborn cannot suffer hedonic damages "since he or she has not had adequate time to develop an ability to perform a pleasurable activity or hobby specifically identified to his or her lifestyle." Ramos v. Kuzas, supra, 65 Ohio St. 3d at 44, 600 N.E.2d at 243. Testimony certainly demonstrated that the deceased was able to experience enough of life to develop pleasurable activities and hobbies before being struck down by the

officers. The factual situation of an unborn child in Ramos is simply not relevant to the present matter.

The court in Fantozzi v. Sandusky Cement Products Co., supra, held that damages for the loss of ability to play golf, baseball, hunt, fish, dance, or engage in other activities are all experiences the loss of which are compensable to the degree in which the plaintiff offered evidence of his enjoyment. 64 Ohio St. 3d at 617, 597 N.E.2d at 486. The Defendants-Cross Appellants have misinterpreted the case law on this issue by asserting that the deceased must have had a certain level of cognitive awareness in order to recover hedonic damages. The plaintiff offered evidence of the deceased's enjoyment of life and certain activities and is therefore entitled to recover according to the degree of enjoyment demonstrated by the evidence.

D. THE AWARD OF HEDONIC DAMAGES WAS SUPPORTED BY THE EVIDENCE.

The Defendants-Cross Appellants adequately point out the testimony relied upon by the jury in deciding the amount of hedonic damages to award. The Defendants-Cross Appellants point out that Scott Tinch's brother testified as to Tinch's enjoyment of baseball, darts, hunting, and fishing (Transcript vol. 9 at 8890). The deceased's wife also testified as to additional activities that Tinch

engaged in, and his enjoyment of these activities (*Id.* at 134).

Sufficient testimony was given at trial to support the jury's finding of hedonic damages. Defendants-Cross Appellants note that no expert testimony was offered in this regard, but offer no support for the contention that such testimony was even necessary to show Tinch's enjoyment of life. Defendants-Cross Appellants listed in their brief competent, credible evidence as to the plaintiff's hedonic damages, and are in effect asking this Court to reweigh that evidence. This Court should not disturb a finding of damages by the jury unless it manifests plain injustice. Meyers v. City of Cincinnati, 14 F.3d 1115 (6th Cir. 1994). The evidence offered supports the jury's award, and cannot be characterized as manifesting plain injustice.

E. ANY ADMISSION OF EVIDENCE RELATING TO CUSTOM AND POLICY WAS CLEARLY HARMLESS TO THE INDIVIDUAL DEFENDANTS.

As discussed in part II(A)(1), infra, the court's error regarding the admission of evidence of custom and policy can be traced to the erroneous bifurcation. To the extent that evidence pointing to the inadequate training of the Dayton police force found its way into the trial, it was clearly harmless to the individual defendants and

demonstrates that this particular excessive force case should not have been bifurcated.

It is apparent that in excessive force cases, the issues of individual and municipal liability are often intertwined. As the district court noted in Roman v. City of Richmond, 570 F. Supp. 1544, 1553 (N.D. Cal. 1983), in some cases, municipal "customs and policies also pertain to the reasonableness of the actions-taken by the officers involved in the deprivations." As the Defendants acknowledge, a central theory in the instant case was that the utter failure of the city to train officers in undercover work unnecessarily placed the officers in situations where they would have to use constitutionally impermissible force (Appellees' Brief at 39). Thus, under the theories advanced in the case at bar, much of the same evidence was admissible against both the city and the individual officers.

The testimony referred to by the Defendants-Cross Appellants all went to the issue of how Officer Sipes acted during the situation at issue, and whether his actions were reasonable in light of accepted standards. Far from demonstrating error in the admission of such evidence--for it was clearly relevant and did not prejudice the individual officers--the necessity and propriety of its admission demonstrate the error in the bifurcation of this case between the individual and municipal defendants.

II. REPLY TO APPELLEES' BRIEF

A. THE DISTRICT COURT INCORRECTLY RULED THAT A SEPARATE CONSTITUTIONAL TORT DOES NOT EXIST AGAINST THE CITY OF DAYTON UNDER 42 U.S.C. § 1983.

The Defendants deny, without citing to the Record, that the district court ruled that a separate cause of action does not exist against a municipality under 42 U.S.C. § 1983. On the contrary, the district court "labored mightily" to convince the plaintiff that a separate claim did not exist against the City of Dayton for its constitutional tort. The district court stated that

> the issue of inadequate training, as well as the lack of policies and procedures, far from being a separate constitutional tort, operates only as a vehicle (or conduit) for the imputation of any liability found against the individual police officers, for having committed a constitutional tort, to the ultimate supervisor of those officers and their employer, the City of Dayton

(R. 139, Order Indicating Court's Intention to Ultimately Enter Judgment in Favor of the Plaintiff and Against the Defendant Sipes dated Apr. 20, 1993 at 2-3.)

The Defendants correctly cite Los Angeles v. Heller, 475 U.S. 796 (1986), for the proposition that a municipality cannot be liable unless the plaintiff actually suffered a constitutional harm. However, this conclusion of the Supreme Court in Los Angeles v. Heller, supra, is not applicable in this present case because the jury found in Heller that the officers did not violate the plaintiff's constitutional rights. In the present case, the jury found that the constitutional rights of Scott Tinch were violated. Heller stands only for the proposition that an underlying constitutional violation is an element of a § 1983 claim against the municipality. The Defendants misconstrue that case by implying that Heller stands for the proposition that a separate constitutional claim against a municipality does not exist.

Two claims are present in this action. The first is against the officers who committed the constitutional tort against Scott Tinch. The other is against the City of Dayton and its Chief of Police for enacting policies and procedures that created circumstances in which the Scott Tinch's constitutional rights were violated.

The district court reasoned that once the City of Dayton agreed to satisfy the claim against Officer Sipes, there was "little to be accomplished in trying liability against the City" (Appellees' Brief at 17). This reasoning

completely ignores the fact that the fundamental policy behind § 1983 lies not only in the compensation of the victim, but also in the deterrence of unconstitutional acts committed under state law. Robertson v. Wegmann, 436 U.S. 584 (1978). The district court decision ignores the fact that the City of Dayton and its Chief of Police were as guilty of constitutional deprivations as the individual officers by reason of their enacting and promoting policies and procedures that have led to the deprivation of individuals, constitutional rights; one purpose of § 1983 is to allow individuals redress, not only against the individual officers, but also against those with a broader responsibility to the citizens of the City.

1. The district court abused its discretion by bifurcation the trials of the officers and the City

A district court does have discretion to bifurcate trials, but the court should not routinely order such a separation. Keyes Fibre Co. v. Packaging Corp. of America, 763 F. Supp. 374 (N.D. Ill. 1991). The decision to try matters separately, however, must be judged by whether fairness was advanced by the decision. in re Bendedictin Litigation, 857 F.2d 290 (6th Cir. 1988). In addition, the court must consider whether judicial economy is served by consolidation of the separate actions against the

officers and the City. Roman v. City of Richmond, supra, 570 F. Supp. at 1553.

The Defendants cite Marryshow v. Town of Bladensburg, 139 F.R.D. 318 (D. Md. 1991), in support of the proposition that bifurcation was proper, but this decision was made under considerably different circumstances than in the present matter. The court in Marryshow v. Town of Bladensburg, supra, made the decision to bifurcate before the commencement of any discovery against the municipality.. As the defendants point out in their brief, the decision to bifurcate in the present case was made at the final pretrial conference, merely three days before the trial was scheduled to begin. The decision to bifurcate at this late date negates any argument that bifurcation was undertaken to promote judicial economy or in the interest of fairness.

The court must consider the prejudice to the party bearing the burden of proof before deciding to bifurcate separate claims. United States Gypsum v. Schiavo Brothers, Inc., 668 F.2d 172 (3d Cir. 1981), cert. denied, 465 U.S. 961 (1982). The Plaintiffs were clearly prejudiced by this decision, because it effectively denied any relief against the City, and prevented the introduction of relevant evidence as to the officers, liability merely because it was deemed to relate to municipal liability. Under these circumstances, the

district court abused its discretion to bifurcate the trial.

2. The bifurcation of the trial and shielding of the City of Dayton undermined the policy behind §1983.

Again, the Defendants and the district court misunderstand the concept of the Plaintiff Is claim against the City of Dayton. The City implements and promotes policies that have led to the violation of a citizens constitutional rights, and this violation gives rise to a cause of action under 42 U.S.C. § 1983. The Policy of the § 1983, to act as a guardian of the people's federalrights against incursion by the state, is undermined by preventing injured citizens from proceeding against municipalities guilty of reckless disregard for citizens, constitutional rights.

Further, by insulating the City, the court negates the deterrent effect of § 1983. Allowing the City to escape liability by indemnifying its officers does not deter the City from implementing policies that lead to the use of excessive force within the police department. The City of Dayton and its police department have been recently inundated with suits relating to police misconduct and the use of excessive force. One goal of § 1983 is to deter future practices that result in constitutional violations. The insulation of the City by the federal court through these bifurcation rulings

prevents § 1983 from serving its purpose as a deterrent.

The Defendants fault the Appellant for not requesting relief in the form of an injunction against the City before the motion for Reconsideration. Defendants make the erroneous and unsupported argument that Rule 8 of the Federal Rules of Civil Procedure requires a party to specifically request injunctive relief. It is clear, however, that an allegation specifically requesting injunctive relief is unnecessary. Reeve v. Aleutian Airways. Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992) (prayer for relief by injunction is not necessary prerequisite to exercise of judicial power).

As this Court has recently noted, Rule 8 of the federal Rules requires only that the "pleading provides defendant notice of the plaintiff's claims and the grounds for the claims.,, Pension Benefit Guaranty v. East Dayton Tool & Die, 14 F.3d 1122, 1127 (6th Cir. 1994). Rule 54(c) of the federal Rules, on the other hand, requires the court. to "grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading." Thus, there was no need for the Plaintiff-Appellant to specifically request injunctive relief, and contrary to the assertion of the Defendants, "[o]missions in a prayer for relief do not bar redress of meritorious claims.,, Pension Benefit Guaranty v. East Dayton Tool & Die, supra 14 F.3d at 1127.

The Defendants, suggestion that the Plaintiff was somehow remiss for not requesting injunctive relief at trial is disingenuous at best. Once the case was bifurcated, leaving only the liability of the individuals before the court, it clearly would have been futile to request injunctive relief against a party who was not even on trial. Put simply, the erroneous ruling of the district court never let the Plaintiff get to the point where injunctive relief could have been requested against the municipality.

3. The bifurcation effectively removed the City of Dayton as a party to this action.

The Defendants contend that the district court's ruling did not prevent the Plaintiffs from seeking relief against the City. Further, the Defendants also argue that "such relief could have been sought in the portion of the trial against the City" (Appellees' Brief at 22). The whole point of the Plaintiffs, argument is that there was no trial against the City. The district court decided that the City could be tried only if it refused to indemnify any verdict obtained against an individual defendant (See, e.g., Transcript of Proceedings dated Mar. 9, 1993 at 1718). By bifurcating the trial and preventing a subsequent proceeding against the City, the district court effectively removed the City, an indispensable party under Fed. R. Civ. P. 19(a)(1), from the case.

B. A CAUSE OF ACTION ON BEHALF OF TONYA TINCH AND HER CHILDREN UNDER 9 1983 DOES EXIST FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAL RELATIONSHIP.

A surviving family member can maintain an independent action for damages under § 1983 where the unconstitutional actions of law enforcement officials cause the death of a parent or spouse. See e.g., Smith v. City of Fontana, 818 F.2d 1411, 1417-20 (9th Cir. 1987). Courts have also recognized a right to recover for a deprivation of a constitutional liberty interest in a continuing family relationship. See, e.g., Greene v. City of New York, 675 F. Supp. 110 (S.D.N.Y. 1987).

Defendants argue that the Plaintiff's complaint asserts civil rights violations under § 1983 on behalf of Scott Tinch only. The Defendants, citation to Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991), however, is misplaced. The situation faced by the court in Purnell v. City of Akron, supra, is not comparable to this present matter. The spouse and children in Purnell were intervening in an original action, and the court found that nothing in the record, including the parties, briefs, suggested that the spouse and children were seeking damages for the violation of the father's constitutional

rights. 925 F.2d at 948.

Tonya M. Tinch, and Justin and Amanda Tinch, have consistently asserted, in the complaint, in their briefs, and in all pre-trial conferences, that they are entitled to recover under §1983 for the deprivation of their liberty interest in a continuing familial relationship, due to the Defendants, unconstitutional acts. They are the heirs of the estate, and therefore their interests are clearly implicated. Protecting the interests of the decedent's children in the instant case is not inconsistent with Purnell v. City of Akron, supra, and therefore this Court should reverse the district court's decision to reject this claim.

C. THE DISTRICT COURT DID ERR IN LIMITING THE JURY'S COMPENSATORY DAMAGES AWARD TO HEDONIC DAMAGES.

The issue of damages in this case is governed by federal, not state, law. Gordon v. Norman, 788 F.2d 1194 (6th cir. 1986). When federal law does not provide a rule regarding damages, the court may look to the common law of the forum state, so long as that law is not "inconsistent with the constitution and laws of the United States." Robertson v. Wegmann, supra, 436 U.S. at 587. In the instant case, however, federal common law does provide guidance regarding damages.

Defendants misrepresent Jaco v. Bloechle, supra, stating that this very situation was considered in that case. If it has any relevance at all to the instant case, Jaco must be interpreted as a rejection of the lock-step application of state remedial rules.[2] The court in Jaco v. Bloechle, supra, stated that the "real controversy in this case is one of standing." 739 F.2d at 241. The court's intent was to determine the survival of a civil rights action. The court did not reach the issue of how damages should be determined in the absence of an applicable federal rule. Significantly, the Jaco court held that the Ohio survival statute was hostile to § 1983's purpose of promoting deterrence of and vindication for civil rights infringements, and therefore the court must implement congressional intent by allowing survival. The Defendants, reliance on Jaco v. Bloechle, supra, to defeat the Plaintiffs's claim for damages is completely misplaced.[3]

---

[2] See Tracy v. Bittles, 820 F. Supp. 396 (N.D. Ind. 1993) (citing Jaco v. Bloechle, supra, for the proposition that when the forum law is hostile to the promotion of deterrence, the court must implement congressional intent rather than state law).

[3]The Appellees, reliance upon Singleton v. Suhr, No. 55367 (Ohio Ct. App. 8th Dist. Cuyahoga County May 18, 1989), is also misplaced; that case did not address the issue of damages in a §1983 action.

In Weeks v. Chaboudy, supra, this Court held that federal, not Ohio, joint and several liability damages rules applied in 1983 cases. Significantly, the Court found that a "federal rule" regarding damages could be found not only in statutes or Supreme Court decisions, but also in the decisions of other federal courts. 984 F.2d at 189. Thus, Defendants-Cross Appellants, claim that federal precedent should be rejected in favor of Ohio law is clearly without merit.

As the Plaintiff's main brief demonstrates, there is a "rule" fashioned by the federal courts regarding the measure of damages in § 1983 cases.[4] This federal-

---

[4] Berry v. City of Muskogee, Oklahoma, 900 F.2d 1489, 1506-07 (10th Cir. 1990) ("We believe appropriate compensatory damages would include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions"); Bell v. City of Milwaukee, supra, 746 F.2d at 1236 (ruling that Wisconsin's restrictive damages limitation was inconsistent with the policies underlying § 1983; thus, the decedents estate could not be precluded from recovering damages for the loss of his life); Graham v. Sauk Prairie Police Commission (holding that estate of an arrestee shot and killed by police officer could recover $550,000 in general loss of life damages in federal civil rights action, despite restrictive Wisconsin statutes); Scothorn v. State, 772 F. Supp. 556 (D. Kan. 1991) (appropriate compensatory damages in § 1983 case include medical and burial expenses, pain and suffering before death, loss

common-law rule also finds support in this Circuit. See Gordon v. Norman, supra, (6th Cir. 1986) (stating that federal standards govern the determination of damages under the civil rights statutes, and rejecting the assertion that an award of punitive damages should be limited by application of Tennessee law); see also Stengel v. Belcher, 522 F.2d 438, 444 (6th Cir. 1975). Therefore, the district court's application of state law to the available damages was erroneous.

D. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR BIFURCATION OF THE ISSUES OF LIABILITY AM DAMAGES, AND COMMITTED FURTHER ERROR BY ALLOWING SAID BIFURCATION JUST BEFORE FINAL ARGUMENT TO THE JURY.

Defendants state that substantial basis existed for not bifurcating the issues of liability and damages, but provide none of these bases. The Plaintiffs, however, have provided numerous examples of prejudicial information, some not even relevant to the issue of damages, that the jury received during the case in chief (Brief of Appellants at 28-33).

---

of earnings, loss of consortium, and other damages available at common law).

Only after the jury received considerable prejudicial information, and on final argument, did the district court bifurcate the issues of liability and damages, restricting the first phase of jury deliberations to liability only. However, the jury had already received prejudicial information on the issue of damages. Had the district court originally granted the motion for bifurcation on these issues, there would not have been this prejudicial effect on the Plaintiffs.

E. THE DISTRICT COURT ERRED IN RULING THAT THE PLAINTIFFS WERE NOT ENTITLED TO AN INFERENCE AGAINST THE DEFENDANTS AS A RESULT OF THE DEFENDANTS' DESTRUCTION OF USE-OF-FORCE DOCUMENTS.

According to the court in Schmind v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994):

> the evidentiary rationale [for the spoilation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is the party in the same position who does not destroy the document.

The Defendants' counsel in the instant case knew that the use-of-force documents requested in the present matter were

relevant and discoverable (See Transcript vol. 2 at 54-57).

F. THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE RELATING TO SCOTT TINCH'S EMPLOYMENT, MARITAL, OR DRUG HISTORY BEFORE THE JURY DETERMINED LIABILITY.

This evidence is only relevant to the issue of damages, and irrelevant to the issue of liability. To allow such evidence to be admitted before the jury determined liability was prejudicial to the Plaintiffs.

G. THE QUESTIONING OF OFFICER BARBARA LONG WAS INAPPROPRIATE AND PREJUDICIAL TO THE PLAINTIFFS.

Even though the court struck the testimony of Officer Long, the jury was exposed to the testimony and was exposed to the judge's derisive admonishment of Plaintiff's counsel for his proper objection. The jury's exposure to this evidence was prejudicial. In addition, it is a judge's duty to maintain an impartial attitude in conduct and demeanor, and the failure to do so here is reversible error. Hawkins v. Campo, 781 S.W.2d 128 (Mo. Ct. App. 1989).

H. THE TESTIMONY OF DEFENDANTS' EXPERT WITNESS SHOULD HAVE BEEN ADMITTED ON REBUTTAL.

The deposition of the Defendants, expert witness was taped and contained extremely relevant testimony to rebut the Defendants' case on numerous issues. The court refused to admit this testimony on rebuttal. Such refusal was erroneous and prejudicial to the plaintiffs.

I. THE DISTRICT COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO PROXIMATE CAUSE.

A reviewing court may reverse a decision on the ground of Plain error in a jury instruction, even if no objection was made, in order to prevent a miscarriage of justice. Even though the Defendants do not recognize this point in their brief, the Sixth Circuit cases cited by the Defendants do. See Murphy v. Owens-Illinois, Inc. , 779 F. 2d 340, 346 (6th Cir. 1985) (lack of objection does not prevent the appellate court from ruling when faced with obvious and prejudicial error).

The district court instructed the jury that they had to find the officers acted knowingly and that the violation of the decedent's fourth amendment rights was a proximate cause of the damage (jury Instructions for First Phase of

Deliberations Nos. 3002, 3003, 3005). The district court's instructions on proximate cause in the present case were obviously improper and prejudicial. Ward v. City of San Jose, 737 F. Supp. 1502, 1513 (N.D. Cal. 1990), aff'd in pertinent part, modified on other grounds, 967 F.2d 280 (9th Cir. 1992). Once the jury found that the act of shooting Scott Tinch was done knowingly, and the use of such force was unreasonable, a violation of Tinch's fourth amendment rights was established.

J. THE DISTRICT COURT'S INSTRUCTION ON PUNITIVE DAMAGES WAS INCORRECT AND RESULTED IN JURY CONFUSION.

The holding of Smith v. Wade, 461 U.S. 30 (1983), that punitive damages may be awarded against an individual where the plaintiff is able to show recklessness or callous indifference to a plaintiffs federally protected rights is technically contained in the jury instructions. However, the district court and the Defendants fail to recognize that the manner in which the law is presented is confusing, and contradicted by the superfluous instructions enveloping the true standard announced in Smith v. Wade, supra.

Even though an instruction correctly states the law, if that instruction is misleading or confusing then the instruction must not be given. See e.g., Matter of Estate of

Casey, 155 Ill. App. 3d 116, 107 Ill. Dec. 809, 507 N.E.2d 962 (4th Dist. 1987) (instruction that included both applicable standard of proof and inapplicable standard of proof should not have been given). The instruction given in the present matter overemphasized the malicious and oppressive aspects of the instruction, rather than the reckless or callous disregard standard. This improper instruction led to jury confusion and entitles the Plaintiffs to a new trial on this issue.

K. THE DISTRICT COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO APPELLEE OFFICER'S DEFENSE OF SELF-DEFENSE OR THE RIGHT TO SELF-DEFENSE.

A police officer's subjective belief that his life is in danger is irrelevant in an excessive force case such as the case at bar. See Yates v. Cleveland, 941 F.2d 444 (6th Cir. 1991). In the present case, it was not objectively reasonable for the officers to believe the deceased knew they were police officers or that the deceased could realize the officers were not about to execute his brother. The Defendants cited one case to support their position; however, this case is not applicable in the present civil law matter because it involves self-defense in a criminal case. State v. Carr, No. C810517 (Ohio Ct. App. 1st Dist. Hamilton City June 2, 1982). The court also failed to give an instruction that the

deceased was entitled to use reasonable force to protect his brother from the unidentified assailants.

L. THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANTS IMMUNITY FROM THE PLAINTIFF'S OHIO LAW WRONGFUL DEATH AND SURVIVAL ACTIONS.

The defense of sovereign immunity must be affirmatively pleaded or it will be waived. Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986). The Defendants raised this defense only in regard to the claim under § 1983, and therefore have waived this defense with regard to the state claim. Moreover, as the Plaintiff's main brief demonstrates, even if properly raised, the defense of immunity could have been overcome in the instant case.

M. THE DISTRICT COURT SHOULD NOT HAVE DISMISSED THE CITY OF DAYTON UPON THE ISSUE OF WRONGFUL DEATH PURSUANT TO OHIO REV. CODE ANN. § 2744.01.

The Defendants' protestations notwithstanding, the conduct alleged and proved in the instant case could subject the individual defendants to criminal prosecution under both Ohio and federal law. Therefore, the municipality was not entitled to immunity.

N. THE JURY'S VERDICT IN THIS CASE IS INCONSISTENT.

Contrary to the Defendants' argument, there is no way to reconcile the jury's verdict that officer Sipes's knowing violation of Scott Tinch's fourth amendment rights was a proximate cause of Tinch's death with the jury's verdict that the malicious, wanton, or reckless conduct of the defendants was not the proximate cause of Scott Tinch's death. In such a case where the jury's verdicts are inherently inconsistent, indicating that the jury was either in a state of confusion or that it abused its power, granting of a motion to alter or amend judgment, for new trial, or relief from judgment, if timely made, is not discretionary. See, e.g, Hopkins v. Coen, 431 F.2d 1005 (6th Cir. 1970).

The Defendants misapply the Supreme Court decision in Atlantic & Golf Stevedors, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 3 64 (1962) . In that case, the Supreme Court found that the jury's verdict was consistent, and in such a case it is inappropriate to search for a view of the case that will make the verdict inconsistent. *Id.* at 364. In the present matter, the jury's verdict is inconsistent on its face, and this inconsistency requires a remand for a new trial on damages with the issue of liability being directed in favor of the Plaintiff as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Cross-Appeal be dismissed, and that this Court sustain the judgment for Plaintiff against Defendant Sipes upon the § 1983 claim. Furthermore, the Court is requested to remand the case with appropriate instructions to set aside the jury's inconsistent verdict in favor of the Defendants on the Plaintiff's wrongful death and survival claims under Ohio law and to enter judgment in favor of the Plaintiff on those claims, or in the alternative, to order a new trial on the Plaintiff's wrongful death claims; and to order a new trial on damages for all causes of action (including the excessive force claims under 42 U.S.C. §1983), and to order a new trial against the City of Dayton.

Respectfully submitted,
DWIGHT D.BRANNON & ASSOCIATES

Dwight D. Brannon
Ohio Registration No. 0021657
320 Regency Ridge Drive
Dayton, Ohio 45402
(513) 291-3400
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been served upon Neil F. Freund, Attorney for Appellees, 1800 Dayton Arcade Centre, Dayton, Ohio 45402 by mailing a copy of the same regular U.S. Mail this day of November, 1994.

Dwight D. Brannon

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 94-3436/3516

TONYA M. TINCH, Administratrix of the Estate of Scott E. Tinch; Individually as the surviving spouse of Scott E. Tinch; As parent, guardian, and next friend of Amanda M. and Justin S. Tinch, Minors,

Plaintiff-Appellant
Cross Appellee

vs.

CITY OF DAYTON; Michael J. Sipes; Russell E. Neville; James E. Newby

Defendants-Appellees
Cross Appellants

On Appeal from the United States District Court
for the Southern District of Ohio
Western Division

Appellant/Cross Appellee's Petition for Rehearing With Suggestion for Rehearing *En Banc*

Dwight D. Brannon
BRANNON & DEUTSCH
320 Regency Ridge Drive
Dayton, Ohio 45459-4215
(513) 291-3400
Attorney for Plaintiff-Appellant/Cross Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS 242
TABLE OF AUTHORITIES 244
STATEMENT FOR REHEARING *EN BANC* 247
BRIEF STATEMENT OF THE CASE 248
BRIEF STATEMENT OF FACTS 250
ARGUMENT 254

I. THE PANEL OVERLOOKED OR APPREHENDED POINTS OF LAW-- THE PANEL'S DECISION IS IN CONFLICT WITH PREVIOUS SIXTH CIRCUIT AUTHORITY AND WITH AUTHORITY FROM OTHER CIRCUITS 254

A. THE APPELLATE PANEL INCORRECTLY HELD STATE LAW CONTROLLING ON THE ISSUE OF DAMAGES AND CREATED A CONFLICT BETWEEN CIRCUITS AS WELL AS PREVIOUS SIXTH CIRCUIT OPINION BY FAILING TO AUTHORIZE RECOVERY FOR A COMPLETE ARRAY OF DAMAGES RESULTING FROM SCOTT TINCH'S DEATH. THE APPELLATE PANEL ALSO MISAPPREHENDED THE LAW BY FINDING THAT HEDONIC DAMAGES WERE NOT RECOVERABLE BY SCOTT TINCH UNDER OHIO LAW 254

B. REHEARING IS REQUIRED BECAUSE THE PANEL OVERLOOKED THE ISSUE OF INCONSISTENCY BETWEEN THE WRONGFUL DEATH VERDICT AND THE VERDICT AGAINST DEFENDANT, SIPES, FOR VIOLATING MR. TINCH'S CONSTITUTIONAL RIGHTS AND PROXIMATELY CAUSING HIS DEATH 261

C. REHEARING SHOULD BE ALLOWED BECAUSE THE PANEL MISAPPLIED PREVIOUS SIXTH CIRCUIT AUTHORITY IN PURNELL v. CITY OF AKRON. A CAUSE OF ACTION ON BEHALF OF TONYA TINCH AND HER CHILDREN UNDER §1983 DOES EXIST FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAL RELATIONSHIP, AND PLAINTIFFS RAISED SAID RIGHT THROUGHOUT THIS CASE 263

D. REHEARING IS MERITED FOR ALL OTHER MISAPPLICATIONS OF LAW 265

CONCLUSION 265

CERTIFICATE OF SERVICE 266

TABLE OF CITATIONS

Cases	Page
Bell v. City of Milwaukee 746 F.2d 1205 (7th Cir. 1984)	247,257
Berry v. City of Muskogee, Oklahoma 900 F.2d 1489 (10th Cir. 1990)	247, 255, 258, 259,
Graham v. Sauk Prairie Police Commission 915 F.2d 1086 (7th Cir. 1990)	247,257
Greene v. City of New York 675 F. Supp. 110 (S.D.N.Y. 1987)	264
Gordon v. Norman 788 F.2d 1194 (6th Cir. 1986)	247,257
Hartzler v. Licking County Humane Society 740 F. Supp. 470 (S.D. Ohio 1990)	262
Jaco v. Bloechle 739 F.2d 239 (6th Cir. 1984)	247,256
National Labor Relations Board v. Brown & Root, Inc. 206 F.2d 3 (8th Cir. 1953)	255
Purnell v. City of Akron 925 F.2d 941 (6th Cir. 1991)	263,264
Ramos v. Kuzas 65 Ohio St. 3d 42, 600 N.E. 2d 241 (1992)	259

Smith v. City of Fontana
818 F.2d 1411, 1417-20 (9th Cir. 1987) 264

Stengel v. Belcher
522 F.2d 438, 444 (6th Cir. 1975) 247,258

Sullivan v. Little Hunting Park, Inc
396 U.S. 229 (1969) 247,256

Ward v. City of San Jose
967 F. 2d 287 (9th Cir. 1992), *modifying*
737 F. Supp. 1502 (N.D. Cal. 1990) 261,262

Weeks v. Chaboudy
984 F.2d 185 (6th Cir. 1993) 247,257

Statutes

Fed. R. App. P. 35 255

Fed. R. App. P. 40 255

Six. Cir. R. App. P. 14 255

Six. Cir. I.O.P., Ch. 20 255

42 U.S.C. §1983. 247,248,250

42 U.S.C. §1988 257

Other Authorities

Funk & Wagnalls, *Standard Desk Dictionary*
New York, (1969), pp. 122 and 135 259

S. Nahmod, *Civil Rights and*
Civil Liberties Litigation:
The Law of Section 1983
§ 4.03 at 275 (3d ed. 1991) 256

REQUIRED STATEMENT FOR REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgement, that the panel decision is contrary to the following decisions of the Sixth Circuit and the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions: *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984), *Weeks v. Chaboudy,* 984 F.2d 185 (6th Cir. 1993) *Gordon v. Norman,* 788 F.2d 1194 (6th Cir. 1986), *Stengel v. Belcher,* 522 F.2d 438, 444 (6th Cir. 1975), and *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969). The panel's decision is also in conflict with these decisions of other Circuits: *Berry v. City of Muskogee, Oklahoma,* 900 F.2d 1489 (10th Cir. 1990), *Bell v. City of Milwaukee,* 746 F.2d at 1236,, *Graham v. Sauk Prairie Police Commission,* 915 F.2d 1086 (7th Cir. 1990).

I express a belief, based on a reasoned and professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether a uniform common law should be applied to assessment of damages under 42 U.S.C. §1983;

2. The proper measure of damages under 42 U.S.C. §l983 for civil rights violations resulting in death.

BRIEF STATEMENT OF THE CASE

On June 19, 1989, Tonya Tinch, the surviving spouse of Scott Tinch filed suit on behalf of the estate of Scott Tinch, on behalf of herself individually, and on behalf of Amanda and Justin Tinch, the two minor children of Scott Tinch. Named as Defendants were, among others, the City of Dayton, Russell Neville and Michael Sipes (the two officers involved in the fatal shooting of Scott Tinch), and James Newby, the Chief of Police. In the suit Plaintiffs sought compensatory and punitive damages under 42 U.S.C. 1983, for violation of Scott Tinch's Fourth, Fifth, Sixth, Eight and Fourteenth Amendments, as well as pendent state claims for wrongful death and survival. (R.2 Complaint). Subsequently, a trial was scheduled for March 15, 1993 on Plaintiffs' claims, including claims for excessive force against Neville and Sipes, and §1983 claims against the City and Newby for failure to train and the maintenance of a custom or policy, or lack thereof, directly and proximately resulting in the death of Scott Tinch. In addition, trial was scheduled on claims for punitive damages against Neville, Sipes, and Newby, on a survival action against Neville, Sipes, Newby, and the City, and on the pendent state claims for wrongful death and survival. As to the City of Dayton, Plaintiffs contended that Scott Tinch's death from excessive force resulted from the City's failure to adequately train officers and from the absence of rules, regulations and

standards circumscribing the operations of undercover officers. Plaintiffs further claimed that these failings represented a custom or policy of Dayton, which caused the death of Tinch through excessive force, together with the pendent state claims for wrongful death and survival.

The pretrial proceedings in this action represented numerous instances of prejudicial and unwarranted unfavorable rulings against Plaintiffs. For example, the Trial Court granted Defendants' Motion to Bifurcate made just one week before trial, but denied a continuance to Plaintiffs.(R. 84, R. 99, and Notation Order of 3/16/93). The Trial Court also overruled Plaintiffs, Motions In Limine and Motion to Bifurcate Liability and Damages, but after allowing evidence prejudicial to Plaintiffs on liability, bifurcated liability and damages just before closing argument. (R. 111). In addition, even though use of force reports against the Defendant police officers were destroyed by Defendants during litigation, the Trial Court refused to issue an instruction indicating that the City had used excessive force. (R. 155, pp. 20, 23, and 30).

The jury returned a verdict against Michael Sipes for knowingly violating Scott Tinch's civil rights, and further found that this violation was a proximate cause of Mr. Tinch's death. However, the jury also inconsistently found at the same time that the Defendants' wanton, malicious, or

reckless conduct was not the proximate cause of Mr. Tinch's injury. In a subsequent determination. the jury awarded Plaintiffs the sum of $110,000.00 against Sipes on the §1983 claim. (R. 134, Verdict). Plaintiffs then filed their Notice of Appeal to this Court on April 15, 1994 (R. 188, Notice of Appeal).

BRIEF STATEMENT OF FACTS

On June 17, 1987, Russell Neville and Michael Sipes were undercover detectives for the Dayton Police Department. On that date, Vickie Grubbs, a previous informant for Det. Neville, telephoned Neville on his voice pager and asked him to meet her at 2147-1/2 East Third Street in Dayton, Ohio to provide assistance to her sister, Rhonda Grubbs, in a matter unrelated to police investigations. (Vicki Grubbs at Tr. Vol. 10, pp. 40,44,76.). Neville and Sipes then went to that location, shabbily dressed in blue jeans and t-shirts, and unrecognizable as police officers (Rodney Bertsch at Tr. Vol. 5, p.52; Michael Sipes at Tr. Vol. 7, p. 152; Videotape (Plaintiffs' Exhibit #10). Sipes and Neville had received virtually no training for undercover work. (Michael Sipes at Tr. Vol. 7, pp. 123, 124, 125, Russell Neville at Tr. Vol. 8, p. 21). In fact, the City of Dayton had no policy, procedures, rules, regulations, or training for undercover work.

Upon arriving at 2147½ E. Third Street, the detectives saw Rhonda Grubbs unconscious on the porch, stepped over her, and entered the kitchen of the house where they were told that Grubbs was in the back room. The detectives decided to do nothing and to wait for her in the kitchen without identifying themselves. On that same night two brothers, Shaun and Scott Tinch were in the vicinity looking for a Robert Kinder. Shortly after detectives Neville and Sipes arrived, Shaun Tinch entered the premises and went to the back room to see Vickie Grubbs. Shaun believed that Ms. Grubbs knew the location of Robert Kinder. (Shaun Tinch at Tr. Vol. 8, p. 120). As Shaun entered the house, the detectives noticed a bulge under his shirt, which was later identified to be a flashlight. At that time the officers did nothing, but allowed Shaun to continue into the back room where Vickie was. (Michael Sipes at Tr. Vol. 7, p. 161-162). Immediately thereafter, Scott Tinch entered the kitchen, carrying an ax handle at his side. Scott Tinch approached Det. Neville, said, "What's happening .... what's happening," and went to the back room, where he stayed for a short time. Scott then came back through the kitchen and left the house.

Shaun Tinch remained in the back room and argued with Vickie Grubbs for a short period of time. Next, Grubbs and Shaun Tinch entered the kitchen, and Grubbs threatened to call the police. Grubbs then recognized Det.

Neville and identified Neville and Sipes as police officers to Shaun Tinch. At that point, both detectives also identified themselves as Dayton Police officers to Shaun by pulling their badges, taking out their guns, and pointing the guns at Shaun. Immediately, Shaun put his hands in the air and complied with the detectives' request to get on his knees with his hands behind his head. (Michael Sipes at Tr. Vol. 7, pp. 176177, 211; Russell Neville at Tr. Vol. 8, p. 71; Shaun Tinch at Tr. Vol. 8, p. 132). Detective Sipes removed a flashlight from Shaun's pants and placed his badge back into his own pants pocket. (Michael Sipes at Tr. Vol. 7, p. 177). At no time was Shaun Tinch ever placed under arrest. (Michael Sipes at Tr., Vol. 7, p. 176; Russell Neville at Tr. Vol. 8, p. 76).

Scott Tinch was out of the house at this point in time and could not have heard the conversation. within seconds, however, Scott re-entered the house. **Obviously,** not knowing Sipes and Neville were police officers, he could only have seen that his brother **was** on the floor in an execution **style** position and that two men were holding a gun to his head. Shaun Tinch, as well as independent witnesses have testified that Det. Neville and Sipes did not identify themselves as police officers to Scott Tinch (Jay Coover at Tr. Vol. 4, p. 155, 156, 175; Nikki Dardio at Tr., Vol. 4, p. 179, 180; Rodney Bertsch at Tr. Vol. 5, p. 18, 41; Shaun Tinch at Tr. Vol. 8, p. 137, 140, 161, 203.

Scott Tinch then rushed into the room to defend his brother. Scott grabbed Det. Sipes' arm as Neville struck him on the head with a gun. Scott never struck the officer with the stick but lost it as the two tussled to the ground. After Tinch and Sipes were on the ground, Sipes fired a shot, killing Tinch. At the time the shot was fired, Sipes was not in danger for his life and the two detectives could have easily overcome Tinch. The officers did not truthfully relate the facts of the shooting and both an investigating officer and coroner deemed the shooting to be a "bad shoot." (Robin Tinch at Tr., Vol. 9, p. 95, 98; Cletus Tinch at Tr. Vol. 9, p. 128).

ARGUMENT

1. REHEARING IS NEEDED BECAUSE THE PANEL OVERLOOKED OR MISAPPREHENDED POINTS OF LAW. *EN BANC* HEARING IS NEEDED BECAUSE THE PANEL'S DECISION IS IN CONFLICT WITH PREVIOUS SIXTH CIRCUIT AUTHORITY AND WITH AUTHORITY FROM OTHER CIRCUITS.

A. THE APPELLATE PANEL INCORRECTLY HELD STATE LAW CONTROLLING ON THE ISSUE OF DAMAGES AND CREATED A CONFLICT BETWEEN CIRCUITS AS WELL AS PREVIOUS SIXTH CIRCUIT OPINION BY FAILING TO AUTHORIZE RECOVERY FOR A COMPLETE ARRAY OF DAMAGES RESULTING FROM SCOTT TINCH'S DEATH. THE APPELLATE PANEL ALSO MISAPPREHENDED THE LAW BY FINDING THAT HEDONIC DAMAGES WERE NOT RECOVERABLE BY SCOTT TINCH UNDER OHIO LAW.

Plaintiffs respectfully request that this case be reheard pursuant to Fed. R. App. P. 40 and Sixth Cir. I.O.P. Ch. 20. Plaintiffs also suggest Rehearing *En Banc*, pursuant to Fed. R. App. P. 35, Sixth Cir. R. App. P. 14 and Sixth Cir. I.O.P. Ch. 20. Rehearing should be permitted in this case because the panel's decision overlooked material matters of law. *National Labor Relations Board v. Brown*

& Root, Inc., 206 F.2d 3 (8th Cir. 1953). Rehearing *En Banc* is further necessary in order that uniformity of decisions in the Sixth Circuit can be maintained.

Specifically, the panel incorrectly held state law controlling on the issue of damages recoverable under §1983. This decision created an inconsistency with decisions in other Circuits and was also inconsistent with previous Sixth Circuit authority. In addition, the panel misapprehended Ohio law by finding that hedonic damages were not recoverable by Scott Tinch.

In their briefs, Plaintiffs specifically mentioned the existence of authority mandating that a uniform rule should be adopted for damages in §1983 actions where the wrongful acts resulted in the death of the party whose civil rights were violated. See, Plaintiffs' Brief, pp. 24-25 and Plaintiffs' Reply Brief, p.15, and cases cited therein, such as *Berry v. City of Muskogee,* 900 F.2d 1489 (10th Cir. 1990). Despite this authority, the panel issuing the decision in this case incorrectly applied *Jaco v. Bloechle,* 739 F.2d 239 (6th Cir. 1984) *(Jaco)* to limit Plaintiffs' recovery to Scott Tinch's conscious pain and suffering before his death. *See*, Tinch Panel Opinion, p.5.

First, contrary to the panels decision, *Jaco* did not

hold that state law determined the damages to be awarded for violations of civil rights. Rather, in *Jaco*, the Court simply resorted to the use of state law to determine the survival of the action and the standing of the personal representative. *See, id.* at 244-45. After doing so, the Court found that the Ohio survival statute, which would not allow the survival of a §1983 action, was hostile to the Constitution and laws of the United States, and therefore could not be applied. id. Therefore, any argument that *Jaco* precludes the recovery of hedonic damages in §1983 actions is unsupported by that decision. In fact, *Jaco* is properly viewed as a rejection of the argument that Ohio's survival statute can control either the survival,or the available damages in a §1983 case.

Also contrary to the panels decision, the principle "that neither the forum state's common law nor general common law is determinative for damage purposes" is apparently universally recognized. S. Nahmod, *Civil Rights and Civil Liberties* Litigation: The Law of Section 1983, § 4.03 at 275 (3d ed. 1991). Instead, the measure of damages available under §1983 is controlled by federal law, not state law, as the Supreme Court made clear many years ago. See, *Sullivan v. Little Hunting Park*, Inc., 396 U.S. 229 (1969) (stating that "compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. §1988 and that both

federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes). The weight of authority further reveals that a court has the leeway to structure an appropriate federal remedy whenever a federal right is impaired. *Bell v. City of Milwaukee,* 746 F.2d 1205, 1239 (7th Cir. 1984) (holding that victim's estate could recover loss-of-life damages even though Wisconsin law did not permit a victim's estate to recover such damages) and *Graham v.Sauk Prairie Police Commission,* 915 F.2d 1085 (7th Cir. 1990) (stating that availability of loss-of-life damages should not vary from state to state depending on state indemnification rules).

The panel has also misapplied previous authority of this Circuit. For example, in *Weeks v. Chaboudy,* 984 F.2d 185 (6th Cir. 1993), this court held that federal, not Ohio, joint and several liability damages rules applied in §1983 cases. Significantly, the court found that a "federal rule" regarding damages could be found not only in statutes or Supreme Court decisions, but also in the decisions of other federal courts. *Id.* at 189. *See also, Gordon v. Norman,* 788 F.2d 1194 (6th Cir. 1986) (stating that federal standards govern the determination of damages under the civil rights statutes, and rejecting the assertion that an award of punitive damages should be limited by application of Tennessee law), and *Stengel v. Belcher,* 522 F.2d 438, 444 (6th Cir. 1975).

The reason for a common standard is obvious -- a life should not be worth less in one state than it is in another. Providing inconsistent remedies, however, has just this effect. In *Berry* the court specifically rejected such an approach, stating:

> If we were to define §1983 remedies in terms Of the state survival action, supplemented by the state wrongful death act, we place into the hands of the state the decision as to allocation of recovery in a §1983 case, and, indeed, whether there can be any recovery at all.

Id. at 1506. Thus, the court held that a federal common law of remedies for §1983 violations should be fashioned to create a uniform rule. Included in this remedy were appropriate compensatory damages such as "medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions." *Id.* at 1507. The court noted that state wrongful death claims would not be foreclosed and would still remain viable, but that no duplicate recoveries would be permitted.

Thus, the panel should have followed the approach

of the *Berry* court and allowed a full recovery for violation of Tinch's constitutional rights. The incorrect nature of the panel's approach in the present case is further demonstrated by the fact that the panel affirmed recovery of $25,000 for Tinch's conscious pain and suffering, but rejected the $86,000 award for Tinch's loss of enjoyment of life. The panel's reasoning was that Tinch allegedly was not cognizant of his loss because his death was virtually instantaneous. " Tinch Panel Opinion, p. 5. Logically, however, how could Mr. Tinch have had conscious pain and suffering without being cognizant, given the fact that these two words mean the same thing? Funk & Wagnalls, *Standard Desk Dictionary,* New York, (1969), pp. 122 and 135.

In any event, even if this were otherwise, the panel's interpretation of Ohio law was plainly wrong. For example, the panel cited *Ramos v. Kuzas,* 65 Ohio St. 3d 42, 600 N.E. 2d 241 (1992) for the proposition that a newborn cannot suffer hedonic damages because she cannot be cognizant of the loss of enjoyment of life. However, the *Ramos* court instead held that a newborn could not suffer these kinds of damages because she had not yet had time to "develop an ability to perform a pleasurable activity or hobby specifically identified to his or her lifestyle." 65 Ohio St. 3d at 44. Thus, the Court's decision was not premised on whether the injured party was conscious or unconscious

at the time of the injury or death, but was instead based on whether a previous opportunity existed for developing an ability to perform pleasurable activities. Clearly, Mr. Tinch, being an adult, had time to develop such abilities, and should have been permitted recovery for loss of enjoyment of life. (*See*, testimony of Scott Tinch's brother as to Tinch's enjoyment of baseball, darts, hunting, and fishing and of Mr. Tinch's wife as to activates he enjoyed.) (Transcript vol. 9 at 88-90 and 134.)

Based on the foregoing, Rehearing is required because the panel overlooked material matters of law. Rehearing *En Banc* is also suggested because of the conflict between this panel's decision and principles previously established in the Sixth and other Circuits. Moreover, should the case be reheard, the many issues left unaddressed by the panel because of mootness should be considered. *See*, Panel Decision, p. 9, ln. 7 and p. 10.

B. REHEARING IS REQUIRED BECAUSE THE PANEL OVERLOOKED THE ISSUE OF INCONSISTENCY BETWEEN THE WRONGFUL DEATH VERDICT AND THE VERDICT AGAINST DEFENDANT, SIPES, FOR VIOLATING MR. TINCH'S CONSTITUTIONAL RIGHTS AND PROXIMATELY CAUSING HIS DEATH.

In its opinion, the panel did not address the issue of inconsistency in verdicts, but only commented that objections to the instruction on proximate cause had been waived. *See*, Panel Opinion, pp. 9-10. Although Plaintiffs disagree with this position, the fact is that even if one assumes the validity of the proximate cause ruling, the verdicts in this case were clearly inherently inconsistent and required retrial of the state wrongful death and survival claims. Because the panel's decision failed to even address this material issue, this case should be reheard.

In *Ward v. City of San Jose*, 967 F. 2d 287 (9th Cir. 1992), modifying 737 F. Supp. 1502 (N.D. Cal. 1990) (*Ward*), the Ninth Circuit Court of Appeals faced an inconsistent verdict analytically identical to the verdict involved in the case at bar. In that case, the plaintiff's decedent was shot and killed by a police officer participating in a raid on a neighbor's house. The jury

found that the defendant officer's use of force violated the decedent's constitutional rights. *See*, 737 F. Supp. at 1505.

Although the district court in *Ward* properly did not require a finding of proximate cause for the §1983 claim, the verdict form required the jury to find proximate cause before it could impose wrongful death liability, since such liability could be established by mere negligence. Moreover, although the jury found the defendant liable under §1983 for violating the decedent's Fourth Amendment rights, the jury found, in connection with the state wrongful death claim, that the officers' negligence was not a proximate cause of the decedent's death. 967 F.2d at 286. The court of appeals held that the inconsistency between these two verdicts required remand of the state wrongful death claim. *Id.* at 286-87. *See also, Hartzler v. Licking County Humane Society,* 740
F. Supp. 470 (S.D. Ohio 1990).

As in *Ward,* the jury in the instant case found that defendant Sipes had violated the decedent's fourth amendment rights by using unreasonable force. The jury further found that both Sipes and Neville acted with a degree of culpability sufficient to impose liability under the wrongful death statute. The jury's verdict that the same use of force was not the proximate cause of Scott Tinch's death for purposes. of the state wrongful death claim is therefore

clearly inconsistent with the verdict of liability on the §1983 claim. However, the panel overlooked this material point in its ruling and the law as set forth in the Ward decision. Instead, the panel focused on the issue of proximate cause and waiver and did not address the merits of the argument on inconsistent verdicts. Consequently, rehearing of this case is required.

Based on the foregoing argument, this case should be reheard, due to the fact that the panel overlooked material points of law on the issue of inconsistent verdicts.

C. REHEARING SHOULD BE ALLOWED BECAUSE THE PANEL MISAPPLIED PREVIOUS SIXTH CIRCUIT AUTHORITY IN PURNELL V. CITY OF AKRON. A CAUSE OF ACTION ON BEHALF OF TONYA TINCH AND HER CHILDREN UNDER § 1983 DOES EXIST FOR THE DEPRIVATION OF THEIR LIBERTY INTEREST IN A CONTINUING FAMILIAL RELATIONSHIP, AND PLAINTIFFS RAISED SAID RIGHT THROUGHOUT THIS CASE.

In its decision, the panel also dismissed Plaintiffs, established right as surviving family members to maintain an independent action for damages under §1983 and for

deprivation of a constitutional liberty interest in a continuing family relationship. *See, e.g., Smith v. City of Fontana,* 818 F.2d 1411, 1417-20 (9th Cir. 1987) and *Greene v. City of New York,* 675 F. Supp. 110 (S.D.N.Y. 1987). Panel Opinion, p. 9. In dismissing these claims, the panel merely stated that Plaintiffs had waived their rights by not inserting them in the Complaint and cited *Purnell v. City of Akron,* 925 F.2d 941 (6th Cir. 1991) *(Purnell).* However, the panel decision misapplied *Purnell.*

First, *Purnell* is not comparable, because the original action therein was brought on behalf of the decedent's estate and two persons claiming to be the decedent's illegitimate children then attempted to intervene. *See, id.* at 942. Moreover, the court in *Purnell* found that nothing in the record, including the parties' briefs, suggested that the spouse and children were seeking damages for the violation of the father's constitutional rights. 925 F.2d at 948. By contrast, in the present case, Tonya Tinch, and Justin and Amanda Tinch, have consistently asserted, in the Complaint, in their briefs, and in all pre-trial conferences, that they were entitled to recover under §1983 for the deprivation of their liberty interest in a continuing familial relationship, due to the Defendants' unconstitutional acts. *See*, R. 2, ¶¶ 1, 4, 5, 22, and 54, R. 21, pp. 22-24, and R. 22, pp. 13-15. Consequently, *Purnell* is not applicable, and the panel

misapplied the law in rejecting Plaintiffs' claims under *Purnell*, without discussion.

D. REHEARING IS REQUIRED FOR ALL OTHER MISAPPLICATIONS OF LAW BY THE PANEL

Plaintiffs are mindful of the admonition that a rehearing is not a vehicle to reargue the merits of the case. However, Plaintiffs believe the entirety of the panel's decision is incorrect, with the exception of the ruling affirming Plaintiffs' right to pain and suffering damages. Consequently, Plaintiffs additionally ask that all issues, excepting that issue,
be reheard.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Petition for Rehearing with Suggestion of Hearing *En Banc* be granted, permitting this case to be reheard and reheard by the Sixth Circuit *En Banc*. Plaintiffs' request is based on the conflict between the panel decision and other decisions of the Sixth and other Circuits regarding proper damages under §1983. Further, the panel **also** misapplied the law by finding that Scott Tinch was not entitled to hedonic damages under Ohio law. The panel overlooked material points Of law and misapplied the law

in connection with the inconsistent jury verdicts and Plaintiffs' assertion of claims on behalf of Tonya Tinch and the minor children of Scott Tinch under §1983. Consequently, Plaintiffs ask that the Court rehear this matter and further suggest rehearing *en banc* and order appropriate relief, all relief requested in Plaintiffs' orginial appellate briefs.

Respectfully submitted,

DWIGHT D. BRANNON & ASSOCIATES
Dwight D. Brannon 0021657
320 Regency Ridge Drive
Dayton, Ohio 45402
(513) 291-3400
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been served upon Neil F. Freund, Attorney for Appellees, 1800 Dayton Arcade Centre, Dayton, Ohio 45402 by mailing a copy of the same regular U.S. Mail this day of March, 1996.

Dwight D. Brannon

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
VERIFIED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TONYA M. TINCH, et al., Plaintiffs,	)	
vs.	)	Case No. C-3-89-263
CITY OF DAYTON; et al., Defendants.	)	Judge Walter Herbert Rice

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §1983 and §1988 and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. The jurisdiction is invoked pursuant to 28 U.S.C. §1343 and the aforementioned statutory and constitutional provisions.

2. Plaintiffs further invoke the pendent jurisdiction of this Court to consider any and all claims arising under State law.

3. The Plaintiff, Tonya M. Tinch, is the surviving spouse of Scott E. Tinch, deceased, and is the duly appointed Administratrix of his Estate pursuant to an Order of the Montgomery County Probate Court, Case No. 266487, Docket No. 201.

4. The Plaintiff, Tonya M. Tinch, also brings this case as the surviving spouse of Scott E. Tinch, in her own individual capacity and not only as representative of the Estate of Scott E. Tinch.

5. The Plaintiff, Tonya M. Tinch, also brings this case on behalf of her minor children, Amanda Marie Tinch and Justin Scott Tinch, and their claims individually and her claim on their behalf as their representative and not solely as a result of the wrongful death of the deceased and the derivative actions under the wrongful death statute.

6. At all times relevant to the matters alleged in this Complaint, Plaintiffs' Decedent, Scott E. Tinch, was a citizen Of the United States of America, without disability relating to his citizenship, and thereby entitled to all of the privileges and immunities thereto obtaining.

7. At all times relevant to the matters alleged in this Complaint, Defendant, City of Dayton, Ohio, was a, duly

incorporated and authorized Municipal Corporation under the laws of the State of Ohio.

8. At all times relevant to the matters alleged in this Complaint, the Defendant Michael J. Sipes was an employee, servant, agent or representative of the City of Dayton Police Department, a department of the Municipal Corporation of Dayton, Ohio.

9. At all times relevant to the matters alleged in this Complaint, the Defendant Russell E. Neville, was an employee, servant, agent or representative of the City of Dayton Police Department, a department of the Municipal Corporation of Dayton, Ohio.

10. At all times relevant to the matters alleged in this Complaint, the Defendant James E. Newby, was an employee, servant, agent, representative and Chief of Police of the City of Dayton Police Department, a department of the Municipal Corporation of Dayton, Ohio.

11. At all times relevant to the matters alleged in this Complaint, the Defendants, Anthony Capizzi, Abner Orick, and Mark Henry were the City Commissioners of the City of Dayton, Ohio.

12. At all times relevant to the matters alleged

in this Complaint, the Defendant, Richard C. Dixon, was the Mayor of the City of Dayton, Ohio.

13. At all times relevant to the matters alleged in this Complaint, the Defendants, John or Jane Doe, are those parties whose improper actions adversely affected the Plaintiff, but who cannot be readily identified and whose names will be made known as their identities become known through discovery.

FIRST CAUSE OF ACTION

14. The Plaintiffs reallege each and every allegation contained in paragraphs one (1) through thirteen (13) as if fully rewritten herein.

15. On or about June 17, 1987, or June 18, 1987, Defendants, Sipes and Neville, were assigned to duty as under-cover, street-clothed, detectives on behalf of the Defendant, City of Dayton, as part of a special task force assigned to street crime, i.e., drugs and prostitution.

16. Defendants, Sipes and Neville, acting allegedly pursuant to informant's tip, arrived at 2147½ E. Third Street, Dayton, Ohio, voluntarily, deliberately, and under color of State and Federal law pursuant to their positions with the Police Department of the City of Dayton, and were

at said premises at approximately 11:49 p.m. on the above mentioned date.

17. On this same date, at approximately the same time, Plaintiffs' Decedent, Scott E. Tinch, was lawfully on said premises, accompanied by his brother, Shaun Tinch, as invitees.

18. At the aforesaid time and place, at approximately 11:49 p.m., the Defendants, Sipes and Neville, while acting voluntarily, deliberately, and under color of state law pursuant to their position with the Police Department of the City of Dayton, attempted to arrest and/or detain Shaun Tinch, without probable cause, brother of the deceased.

19. Plaintiffs' Decedent, upon seeing two men dressed in street clothes, pointing guns at his brother, attempted to intervene and, as a result of the said intervention an altercation ensued whereby Defendant, Sipes, without legal justification, willfully, maliciously, and intentionally assaulted and battered the Plaintiff's Decedent, and fired his revolver at the deceased wounding him in the left side of his chest, under the left arm thereby causing his death.

20. The Defendant, Russell E. Neville, was acting in association with Michael J. Sipes and assaulted and battered the Plaintiffs' Decedent, with some unknown object and acted in such other intentional, reckless, negligent and/or willful manner so as to be a proximate cause of the deprivation of legal rights, injuries, and death of the Plaintiffs' Decedent, together with the proximate damages to the Plaintiffs.

21. The shooting of the Plaintiffs' Decedent, Defendants, Sipes and Neville, violated the rules and regulations of the Dayton Police Department regarding the use of force and deadly force.

22. As a direct and proximate result of the above described unlawful and malicious acts of the Defendants, Sipes and Neville, all committed under color of their authority as City of Dayton police officers, and while acting in that capacity, Scott E. Tinch, Deceased, suffered grievous bodily harm and loss of life, all of which were in violation of his rights under the laws and Constitution of the United States, in particular the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments thereof and 42 U.S.C. §1983 and §1988, along with various violations of Ohio statutory and common law.

23. Scott E. Tinch was the victim of summary execution at the hands of Defendant Sipes. The punishment administered was grossly disproportionate to whatever Scott Tinch's acts may have been, constituted cruel and unusual punishment, and deprived him of his right to due process of law under the laws and Constitution of the United States, in particular the Fourth, Eighth, and Fourteenth Amendments. The shooting of Scott Tinch by Defendant Sipes, was unwarranted, cruel, inhumane, unjustifiable, and excessive.

24. As a further result of the above described acts, Scott Tinch, was deprived of rights and immunities secured to him under the Constitution and laws of the United States and of the State of Ohio including but not limited to, his rights under the Fourteenth Amendment to be secure in his person, to be free from punishment without due process and equal protection of the laws.

25. The failure of the Defendant, City of Dayton, Police Chief, Mayors, Commissioners, agents, attorneys, et al., to provide training and supervision regarding the lawful use of an officer's service revolver amounts to gross negligence and a deliberate indifference to the safety and lives of the citizens of Dayton, Ohio. This gross negligence was a proximate cause of the death of Plaintiffs' Decedent.

SECOND CAUSE OF ACTION

26. Plaintiffs reincorporate each and every allegation contained in paragraphs one (1) through twenty-five (25) as if fully rewritten herein.

27. The activities of the Defendants as alleged above were carried out willfully and wrongfully and in such a manner as to foster, encourage and evoke violence, injury and death by the wrongful, improper and malicious use of force under the alleged authority and color of the laws of the State and the Municipalities which said Defendants represented.

28. The activities of the Defendants as alleged above were carried out under the guise of a tip from an informant, through the use of deception, misstatements and falsehoods; such improper procedure in responding to such tips was commonly employed by members of the Task Force and the Police Department of the City of Dayton.

29. As a direct and proximate result of the wrongful activities of Defendants alleged above, the deceased was subjected, or was caused to be subjected, to the wrongful denial of his privileges, rights and immunities as a United States Citizen, all under color of State Law and, particularly, Scott E. Tinch was denied his right to life

without due process of law as secured to and guaranteed to him under the 14th Amendment to the Constitution of the United States of America and was subjected to unreasonable or unlawful seizure of his person contrary to the Fourth and Fourteenth Amendments to the United States Constitution.

30. Plaintiffs allege that the actions set forth above were carried out collectively by the named Defendants as well as individually by each of the Defendants, and particularly those Defendants who planned, participated in, directed, orchestrated and ratified the manner of the execution of the contact, battery and infliction of fatal wounds on the Plaintiffs' Decedent.

31. As a direct and proximate result of the activities alleged above, Scott E. Tinch, was caused to suffer damages, including pain and suffering, and the very deprivation of his life for which the Defendants named above are jointly and severally liable.

THIRD CAUSE OF ACTION

32. Plaintiffs reallege each and every allegation contained in paragraphs one (1) through thirty-one (31) as if fully rewritten herein.

33. The shooting of Scott E. Tinch by Defendant Sipes, was carried out in such negligent fashion as to demonstrate a lack of conscious regard for Decedent's rights to be free from unnecessary and unlawful bodily harm or the threat thereof, and without the due care and diligence which a prudent and reasonable individual would have displayed in making an arrest.

34. The shooting of Scott E. Tinch by Defendant Sipes, was carried out willfully, wantonly, maliciously, and with such reckless disregard of the consequences as to reveal a conscious indifference to the clear risk of death or serious bodily injury.

35. Defendants, Richard Dixon and James E. Newby's, failure to adequately train, supervise, discipline or, in any other way control Detective Sipes in the exercise of his police functions, and their failure to enforce the laws of the State of Ohio and the regulations of the City of Dayton Police Department within the City of Dayton Police force, is evidence of a reckless lack of conscious regard for the rights of the public, including those of Scott E. Tinch, and exhibits a lack of that degree of due care which prudent and reasonable individuals would show in executing the duties of Police Chief and Mayor respectfully.

36. Defendants failure to adequately train, supervise, discipline, or in any other way control Defendants, Michael Sipes and Russell E. Neville, in the exercise of their police duties, and their failure to enforce the laws of the State of Ohio and the regulations of the City of Dayton Police Department within the Dayton Police force was and is carried out willfully, wantonly, maliciously, and with such reckless disregard of the consequences as to display a conscious indifference to the danger of harm and injury, including death, to the citizens of Dayton, Ohio, including Scott E. Tinch.

37. The above allegations demonstrate that the death of Scott E. Tinch was proximately caused by the unlawful violence and reckless acts of the Defendants. Under the laws of Ohio, the cause of action is thereby established to recover damages for the injuries and losses to Plaintiffs as the result of the wrongful death of Scott E. Tinch by the Defendants.

FOURTH CAUSE OF ACTION

38. Plaintiffs reallege each, and every allegation contained in paragraphs one (1) through thirty-seven (37) as if fully rewritten herein.

39. At all times relevant to the matters alleged above, Defendants, Sipes and Neville, were working for, in cooperation with, under the direction of, and with the approval and ratification of the Task Force Unit of the Dayton Police Department, a Department of the Municipal Corporation of Dayton, Ohio.

40. At all times relevant to the matters alleged above, James E. Newby, was the Chief of Police of the Police Department of Dayton, Ohio, and as such Chief was responsible for the customs, procedures, policies and activities of the Dayton Police Department, including the Task Force Unit of said Department and said Defendant was aware of the customs, conduct and procedures in general of the Task Force and its members.

41. At all times relevant to the matters alleged above, Defendant John Doe, Officer in charge of the Task Force of the Police Department of the Municipal Corporation of Dayton, Ohio, was the person in charge of the implementation of customs, policies, procedures and directives both of the Police Department and of the Task Force Unit of said Department and had knowledge of same.

42. The Defendant, City of Dayton, by and through the position, knowledge, activities and ratification of its Police Chief, Officer in Charge of its Task Force Unit and

other person or persons having supervisory responsibility, knew that the same or similar conduct complained of hereinbefore had occurred in the past, knew the same occurred in the instant case, ratified the conduct of the police Officers through the implementation, promulgations, enforcement and execution of such policies, customs and procedures, and in particular, said Defendant implemented, promulgated, adopted, ratified and acquiesced in the manner of the execution of searches and similar activities involving private persons and their property by its Task Force Unit in such a way as to incite, induce and evoke violent behavior by both the officers and employees executing said searches and similar activities and by the private citizens who were made the subject thereof; in addition, said Defendant, by and through the position, knowledge, activities and ratification of the person or persons having supervisory responsibility over the Task Force Unit implemented promulgated, adopted, ratified and acquiesced in the use of responding to alleged tips as described hereinbefore and used in this case resulting in the aforesaid activity willfully, wantonly, recklessly or negligently creating an unlawful and unreasonable risk of violence and injury.

43. As a direct and proximate consequence of the activities of the Defendant, the City of Dayton, Scott E. Tinch was deprived of his right to life without due process of law in violation of the 14th Amendment of the

Constitution of the United States and was subjected to unreasonable or unlawful seizures of his person contrary to the United States Constitution.

44. As a direct and proximate result of the activities alleged above, Scott E. Tinch was caused to suffer damages, including pain and suffering, and the loss of his life for which said Defendants are liable.

FIFTH CAUSE OF ACTION

45. Plaintiffs reallege each and every allegation contained in paragraphs one (1) through forty-four (44) as if fully rewritten herein.

46. At all times relevant to the matters alleged herein, Defendant, James E. Newby was the Chief of Police of the Police Department of Dayton, Ohio, and an unknown person, John Doe, was the officer in charge of the Task Force Unit of the Dayton Police Department.

47. Defendant James E. Newby, was responsible for the customs, procedures, policies and activities of the Task Force Unit and was directly responsible for the implementation of such customs, policies, procedures and directives pursuant to which the Unit operated.

48. Defendant Newby, and the officer in charge of the Task Force Unit, implemented, promulgated, adopted, ratified and acquiesced in policies, customs and procedures pursuant to which the Task Force Unit investigated tips, arrested perpetrators of crimes and similar activities involving private persons and their property in such a way as to incite, induce and evoke violent behavior by both the officers and employees executing said searches and similar activities and by the private citizens who were made the subject thereof.

49. Pleading in the alternative, Defendant Newby, and other supervisory Defendants, knew that the same or similar conduct complained of hereinbefore had occurred in the past, knew that the same occurred in the instant case, ratified and condoned the conduct of the individual police officers involved in this action and, despite such knowledge and despite their supervisory position with the City of Dayton and its Police Department, willfully, wantonly, recklessly or negligently failed to train the officers of the Task Force Unit or to supervise the activities of such officers so as to avoid, or reasonably avoid the risk of, the wrongs complained of in this action as to the improper manner of the execution of investigations, arrests, and activities involving private persons and their property.

50. As a direct and proximate consequence of the wrongful activities of Defendants as alleged herein, Scott E. Tinch, was deprived of his right to life without due process of law in violation of the 14th Amendment of the Constitution of the United States and he was caused to suffer damages, including pain and suffering, and the loss of his life for which said Defendants are liable and he was subjected to unreasonable or unlawful seizure of his person contrary to the Fourth and Fourteenth Amendments of the United States Constitution.

SIXTH CAUSE OF ACTION

51. Plaintiffs reallege each and every allegation contained in paragraphs one (1) through fifty (50) as if fully rewritten herein.

52. As the Administratrix of the Estate of Scott E. Tinch, Plaintiff, Tonya M. Tinch, is the personal representative of Scott E. Tinch, in accordance with Section 2125.02 of the Ohio Revised Code.

53. As a direct and proximate result of the aforementioned wrongful acts of the Defendants, said Defendants caused the death of Scott E. Tinch.

54. Scott E. Tinch left surviving him, the Plaintiff, Tonya M. Tinch, as his surviving spouse, and Amanda Marie Tinch and Justin Scott Tinch, as his two infant children, and as a direct and proximate result of the wrongful activities of the Defendants as alleged above, said persons were caused damage from the loss of support from the reasonably expected earning capacity of the Plaintiffs' Decedent, funeral and burial expenses, the loss of services, of the Decedent, the loss of society, companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education which the surviving spouse and children, as his next of kin, had a right to expect from said Decedent, the loss of any prospective inheritance from the Decedent, and suffered great and severe mental anguish as a result of the wrongful act of the Defendants and the death of Plaintiffs' Decedent.

55. At all times relevant to the matters alleged in this Complaint, Defendants were employees, servants, agents and representatives of the Municipal Corporation of Dayton, Ohio, and were at all times acting within the course and scope of their employment for such Municipal Corporation.

56. Defendant, the City of Dayton, as employer of the other Defendants as alleged above, is liable to the Plaintiffs for the wrongful acts of their servants and

employees which wrongful acts were committed within the scope of said employment.

57. This Complaint is being filed on June 19, 1989, a Monday, pursuant to Rule 6 of the applicable Rules of Civil Procedure, to be in conformity with the statute of limitations. The reason for the aforesaid late filing was the fact that the case was presented to counsel with only two weeks to investigate said case. Further leave to amend will be sought of this Honorable Court.

WHEREFORE, Plaintiffs demand judgement against the Defendants, jointly and severally as follows:

a. The Plaintiff, Tonya M. Tinch, as Administratrix of the Estate of Scott E. Tinch demands judgment in the sum of TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages and/or for all relief to which she is entitled as provided under Section 2125.02 of the Ohio Rev. Code Ann.;

b. The Plaintiff, Tonya M. Tinch, individually and as surviving spouse of Scott E. Tinch demands judgment in the sum of TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN

MILLION DOLLARS ($10,000,006.00) in punitive damages;

c. The Plaintiff, Tonya M. Tinch, as parent and next friend of Amanda Marie Tinch, demands judgment in the sum of TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages;

d. The Plaintiff, Tonya M. Tinch, as parent and next friend of Justin Scott Tinch, demands judgment in the sum of TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages;

e. for the costs of this action, attorney fees, pre-judgment interest, post-judgment interest and to such other and future relief to which they may be deemed entitled.

BRANNON, HALL & TUCKER

Dwight D. Brannon
Attorney for Plaintiffs
Six South Patterson Blvd.
Dayton, Ohio 45402
(513) 228-2306

JURY DEMAND

The Plaintiffs respectfully demand a trial by jury on all issues herein.

BRANNON, HALL & TUCKER

_____

Dwight D. Brannon
Attorney for Plaintiffs